Docket for 03-101

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v.
Southern Utah Wilderness Alliance, et al.
Docketed: July 18, 2003
Lower Ct: United States Court of Appeals for the Tenth Circuit
Case Nos.: (01-4009)
Decision Date: August 29, 2002
Rehearing Denied: February 18, 2003
Questions Presented

| ~~Date~~ | ~~~~~~~~Proceedings and Orders~~~~~~~~

Feb 17 2004	Brief amici curiae of Natural Resources Defense Council, et al. filed. (Distributed)
Feb 17 2004	Brief amicus curiae of National Organization of Veterans filed. (Distributed)
Feb 17 2004	Brief amici curiae of Professors of Administratve and Environmental Law, et al. filed. (Distributed).
Feb 17 2004	Brief amici curiae of California, et al. filed. (Distributed)
Feb 17 2004	Brief amicus curiae of Former Chairs and General Counsels of the Council of Environmental Quality filed. (Distributed)
Feb 17 2004	Brief amicus curiae of Montana Wilderness Association filed. (Distributed)
Mar 10 2004	Joint appendix filed. (Distributed)
Mar 22 2004	Reply of petitioners Gale Norton, Secretary of the Interior, et al. filed. (Distributed)
Mar 29 2004	Argued. For petitioners: Edwin S. Kneedler, Deputy Sollicitor General, Department of Justice, Washington, D.C. For respondents: Paul M. Smith, Washington, D.C.

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No.

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In the Supreme Court of the United States

GALE NORTON, SECRETARY, UNITED STATES DEPARTMENT OF THE INTERIOR, ET AL., PETITIONERS

v.

SOUTHERN UTAH WILDERNESS ALLIANCE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the authority of the federal courts under the Administrative Procedure Act, 5 U.S.C. 706(1), to "compel agency action unlawfully withheld or unreasonably delayed" extends to review of the adequacy of an agency's ongoing management of public lands under general statutory standards and its own land use plans.

PARTIES TO THE PROCEEDINGS

The petitioners in this Court are Gale Norton, Secretary of the Interior; Kathleen Clarke, Director of the Bureau of Land Management; and the Bureau of Land Management. The respondents are:

Southern Utah Wilderness Alliance
The Wilderness Society
The Sierra Club
The Great Old Broads for Wilderness
Wildlands CPR
Utah Council of Trout Unlimited
American Lands Alliance
The Friends of the Abajos
The State of Utah
San Juan County
Emery County
Utah School and Institutional Trust Lands Administration
Utah Shared Access Alliance
Blue Ribbon Coalition
Elite Motorcycle Tour
Andrew Chatterly

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutory provision involved	2
Statement	2
Reasons for granting the petition	9
A. Section 706(1) does not provide a vehicle for judicial review of an agency's ongoing programmatic activity	10
B. The court of appeals erred in holding that SUWA's challenges to BLM's management of off-road vehicle use on public lands are cognizable under Section 706(1)	19
C. Review by this Court is warranted to decide whether Section 706(1) may be invoked to challenge an agency's ongoing management of public lands and other programs	25
Conclusion	28
Appendix A	1a
Appendix B	55a
Appendix C	77a

TABLE OF AUTHORITIES

Cases:

Auer v. *Robbins*, 519 U.S. 452 (1997)	18
Bennett v. *Spear*, 520 U.S. 154 (1997)	11, 13, 21, 23
Bowen v. *Georgetown Univ. Hosp.*, 488 U.S. 204 (1988)	13
Brock v. *Pierce County*, 476 U.S. 253 (1986)	13
Brown v. *Gardner*, 513 U.S. 115 (1994)	12
Center for Biological Diversity v. *Veneman*, No. 02-16201, 2003 WL 21517980 (9th Cir. July 7, 2003)	27

Cases—Continued: Page

Costle v. *Pacific Legal Found.*, 445 U.S. 198 (1980) 13
Ecology Ctr. Inc. v. *United States Forest Serv.*, 192 F.3d 922 (9th Cir. 1999) 17
Franklin v. *Massachusetts*, 505 U.S. 788 (1992) 11
Gillis v. *Department of Health & Human Servs.*, 759 F.2d 565 (6th Cir. 1985) 17
Independence Mining Co. v. *Babbitt*, 105 F.3d 502 (9th Cir. 1997) 16
Kleppe v. *Sierra Club*, 427 U.S. 390 (1976) 22, 27
Lujan v. *National Wildlife Fed'n*, 497 U.S. 871 (1990) ..... *passim*
Marsh v. *Oregon Natural Res. Council*, 490 U.S. 360 (1989) 6, 21
Montana Wilderness Ass'n v. *United States Forest Serv.*, 314 F.3d 1146 (9th Cir. 2003) 9, 26
Mt. Emmons Mining Co. v. *Babbitt*, 117 F.3d 1167 (10th Cir. 1997) 16
Ohio Forestry Ass'n v. *Sierra Club*, 523 U.S. 716 (1998) 23, 24
Potomac Elec. Power Co. v. *ICC*, 702 F.2d 1026 (D.C. Cir. 1983) 16
Public Citizen Health Research Group v. *Commissioner, Food & Drug Admin.*, 740 F.2d 21 (D.C. Cir. 1984) 13
Public Citizen v. *Nuclear Regulatory Comm'n*, 845 F.2d 1105 (D.C. Cir. 1988) 17
Safeway Stores, Inc. v. *Brown*, 138 F.2d 278 (Emer. Ct. App.), cert. denied, 320 U.S. 797 (1943) 14, 15
Sierra Club v. *Peterson*, 228 F.3d 559 (5th Cir. 2000), cert. denied, 532 U.S. 1051 (2001) 9, 17, 25, 26
United States v. *L.A. Tucker Truck Lines*, 344 U.S. 33 (1952) 18
Washington State Dep't of Soc. & Health Servs. v. *Estate of Keffeler*, 123 S. Ct. 1017 (2003) 11

Statutes, regulations and rule: Page

Administrative Procedure Act, 5 U.S.C., 551 *et seq.*:
5 U.S.C. 551(4) 11
5 U.S.C. 551(6) 11
5 U.S.C. 551(8) 11
5 U.S.C. 551(10) 11
5 U.S.C. 551(11) 11
5 U.S.C. 551(13) 11, 12, 13
5 U.S.C. 553(e) 18
5 U.S.C. 701(b)(2) 12
5 U.S.C. 702 10
5 U.S.C. 704 ..... 11, 12, 21
5 U.S.C. 706 ..... 2, 10
5 U.S.C. 706(1) ..... *passim*
5 U.S.C. 706(2) ..... *passim*
Federal Land Policy and Management Act of 1976, 43 U.S.C. 701 *et seq.*:
43 U.S.C. 1711 4
43 U.S.C. 1712(a) 4
43 U.S.C. 1712(c) 4
43 U.S.C. 1732(a) 4, 7, 24
43 U.S.C. 1782(a) 3, 25
43 U.S.C. 1782(c) 3, 7, 19
Montana Wilderness Study Act, Pub. L. No. 95-150, 91 Stat. 1234 26
National Environment Policy Act of 1969, 42 U.S.C. 4321 *et seq.* 5
42 U.S.C. 4332(2)(C) 19, 21
National Forest Management Act of 1976, 16 U.S.C. 1600 *et seq.* 25, 26
40 C.F.R.:
Section 1501.4(b) 21
Section 1502.9(c)(1)(ii) 21
Section 1508.9(a)(1) 21

Regulations and rule—Continued:	Page
Section 1508.13	21
43 C.F.R.:	
Section 1601.0-5(b)	24
Section 1601.0-5(c)	7, 24
Section 1610.5-3(a)	25
Section 1610.5-3(b)	24
Fed. R. Civ. P. 54(b)	6
Miscellaneous:	
Attorney General's Manual on the Administrative Procedure Act (1947)	13-14, 15, 16, 20
44 Fed. Reg. (1979):	
p. 72,014	3, 4
p. 72,016	3
p. 72,024	4
Staff of the Senate Comm. on the Judiciary, 79th Cong., 1st Sess., *Administrative Procedure Act: Legislative History* 79th Congress (Comm. Print 1945)	16

In the Supreme Court of the United States

No.

GALE NORTON, SECRETARY, UNITED STATES DEPARTMENT OF THE INTERIOR, ET AL., PETITIONERS

v.

SOUTHERN UTAH WILDERNESS ALLIANCE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the Secretary of the Interior and the other federal parties, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-54a) is reported at 301 F.3d 1217. The opinion of the district court (App., *infra*, 55a-76a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 29, 2002. A petition for rehearing and rehearing en banc was denied on February 18, 2003 (App., *infra*, 77a). On May 12, 2003, Justice Breyer extended the time within which to file a petition for a writ of certiorari to and including June 18, 2003, and on June 6, 2003, Justice Breyer extended that

time to and including July 18, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 706 of Title 5 provides, in pertinent part:

> The reviewing court shall—
>
> (1) compel agency action unlawfully withheld or unreasonably delayed; and
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (B) contrary to constitutional right, power, privilege, or immunity;
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
>
> (D) without observance of procedure required by law;
>
> (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
>
> (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

STATEMENT

This case concerns the scope of the federal courts' authority under the Administrative Procedure Act (APA) to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. 706(1). A divided panel of the Tenth Circuit held that a plaintiff may invoke Section 706(1) to challenge the adequacy of an agency's ongoing administration of a government program (here, an agency's management of certain public lands). The panel held that Section 706(1) is not confined to suits to compel final "agency action" of the sort that is reviewable under Section 706(2). The panel also held that Section 706(1) may be used to enforce generally stated statutory standards, which leave an agency with considerable discretion with respect to their definition and implementation, and to compel the performance of activities contemplated in an agency's own general planning documents, even in the absence of any proposed site-specific action.

1. The Bureau of Land Management (BLM) administers approximately 23 million acres of federal land in the State of Utah. This suit concerns BLM's management of two categories of such land.

The first category consists of "wilderness study areas," or WSAs. In the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. 1782(a), Congress directed BLM to determine whether any public lands within its supervision were suitable for preservation as wilderness. Since the enactment of FLPMA, BLM has designated 2.5 million acres in Utah as wilderness study areas, of which the President recommended that 1.9 million acres be designated as wilderness. Until Congress acts on that recommendation, BLM is required under FLPMA to manage the wilderness study areas "in a manner so as not to impair the suitability of such areas for preservation as wilderness." 43 U.S.C. 1782(c).

To implement that "non-impairment" standard, BLM promulgated the Interim Management Policy for Lands under Wilderness Review, 44 Fed. Reg. 72,014 (1979). Under the Interim Management Policy, BLM is to manage each wilderness study area to prevent it from being "degraded so far * * * as to significantly constrain the Congress's prerogative to either designate [it] as wilderness or release it for other uses." *Id.* at 72,016. The Interim Management

Policy makes clear, however, that "[m]anagement to the non-impairment standard does not mean that lands will be managed as though they had already been designated as wilderness." *Ibid.* Among other things, the Interim Management Policy contains specific provisions with respect to motor vehicle use, restricting such use in wilderness study areas to existing ways and within designated "open" areas. *Id.* at 17,024.

The second category of lands at issue in this case consists of public lands adjacent to the wilderness study areas. Those lands are managed by BLM under general provisions of FLPMA and land use plans. FLPMA requires BLM to develop land use plans for units of public lands under its jurisdiction, see 43 U.S.C. 1712(a) and (c); to "manage the public lands * * * in accordance with the land use plans," 43 U.S.C. 1732(a); and to revise the land use plans "as appropriate," 43 U.S.C. 1712(a).[1]

2. Southern Utah Wilderness Alliance and other organizations (collectively SUWA), which are among the respondents here, filed suit under 5 U.S.C. 706(1) against the Secretary of the Interior, the Director of BLM, and BLM. SUWA claimed that BLM had "failed to perform its statutory and regulatory duties" to protect public lands in Utah from damage allegedly caused by off-road vehicle use. App., *infra*, 3a. SUWA also claimed that BLM had failed to implement provisions of its land use plans relating to management of off-

[1] On April 11, 2003, the Secretary of the Interior and the Governor of Utah agreed to settle a lawsuit involving the designation of future wilderness study areas in Utah. Under the terms of that settlement, the Secretary acknowledged that her authority to designate wilderness study areas under 43 U.S.C. 1782 expired in 1993. BLM will continue to exercise its authority under 43 U.S.C. 1711 to inventory resources or other values, including wilderness values. The settlement does not apply to any previously designated wilderness study areas or otherwise affect any of the claims ruled upon by the court of appeals in this case.

road vehicles. *Ibid.* SUWA further claimed that BLM had failed to take a "hard look" at whether, pursuant to the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, it should prepare supplemental environmental impact statements or environmental assessments for areas affected by increased off-road vehicle use. App., *infra*, 3a.

SUWA thereafter filed a motion for a preliminary injunction. The motion sought to compel BLM to prohibit off-road vehicle use in four wilderness study areas and five additional areas. Groups representing the interests of off-road vehicle users intervened to oppose the suit. App., *infra*, 3a-4a.[2]

After an evidentiary hearing, the district court denied SUWA's motion for a preliminary injunction and granted the intervenors' motion to dismiss five counts of the complaint as not cognizable under 5 U.S.C. 706(1). App., *infra*, 55a-76a. The court characterized Section 706(1) as "a very narrow exception to the APA's limitation of judicial review of final agency action," which "has been narrowly construed to prevent judicial intrusion into the day-to-day workings of agencies" and has been understood to provide relief that "is essentially the equivalent of mandamus." *Id.* at 59a. The court consequently reasoned that Section 706(1) affords a remedy only when an agency is subject to a "clear nondiscretionary duty" and "only where there is a genuine failure to act." *Id.* at 59a-60a.

The district court held that SUWA's claim that BLM had failed to prevent impairment of the wilderness study areas was not "a genuine failure-to-act claim" cognizable under

[2] The intervenors have separately petitioned for certiorari seeking review of the court of appeals' decision in this case. *Utah Shared Access Alliance* v. *Southern Utah Wilderness Alliance*, No. 02-1703 (filed May 19, 2003).

Section 706(1). App., *infra*, 65a; see *id.* at 62a-66a. The court observed that BLM had presented "significant evidence about the steps it is and has been taking to prevent * * * impairment" of those areas, and that even SUWA had acknowledged that BLM was taking some action in that regard. *Id.* at 65a-66a.

Similarly, the district court held that Section 706(1) did not provide a basis for SUWA to challenge BLM's alleged failure to complete monitoring and planning activities called for in its land use plans. App., *infra*, 67a-68a. The court characterized the challenge as one "regarding the sufficiency of BLM's actions, rather than a failure to carry out a clear, ministerial duty." *Id.* at 67a. The court also concluded that noncompliance with a land use plan may be challenged only in connection with "some site-specific action * * * that does not conform to the plan." *Ibid.*

The district court further held that BLM was not required under NEPA to take a "hard look" at whether increased off-road vehicle use required the preparation of supplemental environmental impact statements or environmental assessments. App., *infra*, 74a. The court reasoned that BLM did not have "a clear duty to act under NEPA" to consider the need to supplement its earlier environmental analyses. *Ibid.* "Indeed," the court added, "the decision whether to prepare a supplemental environmental impact statement is the kind of factual question that implicates agency technical expertise and requires courts to 'defer to the informed discretion of the responsible federal agencies.'" *Ibid.* (quoting *Marsh* v. *Oregon Natural Res. Council*, 490 U.S. 360, 377 (1989)).

The district court certified its dismissal of the claims as final judgments under Rule 54(b) of the Federal Rules of Civil Procedure. See App., *infra*, 4a & n.1.

3. A divided panel of the Tenth Circuit reversed and remanded the case for consideration of the merits of SUWA's claims. App., *infra*, 1a-54a.

a. The court of appeals held that SUWA could assert a challenge under Section 706(1) to BLM's alleged failure to comply with its duty under FLPMA to manage the wilderness study areas "so as not to impair the suitability of such areas for preservation as wilderness." App., *infra*, 14a (citing 43 U.S.C. 1782(c)). The court concluded that the "agency action" that may be compelled under Section 706(1) includes not only "final, legally binding actions," but also "day-to-day management actions" such as BLM's ongoing management of the wilderness study areas. *Id.* at 15a-16a. While acknowledging that agency action may be compelled under Section 706(1) "only where the agency fails to carry out a mandatory, nondiscretionary duty," *id.* at 10a, the court concluded that the general statutory requirement that BLM manage the wilderness study areas to prevent impairment is mandatory and nondiscretionary, and thus may be enforced in a suit under Section 706(1), *id.* at 13a. The court further held that relief may be warranted under Section 706(1) notwithstanding that BLM has "taken some action * * * to address alleged impairment" of the wilderness study areas. *Id.* at 19a.

The court of appeals also held that Section 706(1) permits a challenge to BLM's alleged failure to complete certain activities specified in its land use plans applicable to the wilderness study areas and public lands adjacent to them. App., *infra*, 24a-32a. The court reasoned that a mandatory, nondiscretionary duty to complete those tasks arises from FLPMA's provision that public lands "shall [be] manage[d] * * * in accordance with the land use plans," 43 U.S.C. 1732(a); from regulations that the court understood to impose a comprehensive, judicially enforceable duty on BLM to "adhere to the terms, conditions, and decisions" of such plans, 43 C.F.R. 1601.0-5(c); and from language in the land use plans stating that off-road vehicle use "will be monitored" in one area and that an off-road vehicle imple-

mentation plan "will be developed" for another area. App., *infra*, 26a. While acknowledging that Congress intended BLM's land use plans "to be dynamic documents, capable of adjusting to new circumstances and situations," *id.* at 27a, the court concluded that BLM "can be held accountable for failing to act as required by the mandatory duties outlined in" such plans, *id.* at 28a. The court also concluded that BLM could be compelled under Section 706(1) to comply with provisions of a land use plan even in circumstances, such as those here, in which BLM is not undertaking any "site-specific project." *Id.* at 28a-29a.

Finally, the court of appeals held that BLM could be compelled under Section 706(1) to take a "hard look" at whether increased off-road vehicle use in certain areas warranted the supplementation of its earlier environmental analyses under NEPA. App., *infra*, 32a-39a. The court found it irrelevant to the availability of relief under Section 706(1) that BLM intended to perform additional NEPA analyses in the near future in connection with its revision of existing land use plans, and that compelling BLM to undertake the NEPA analyses sought by SUWA would divert BLM's resources from other current and planned NEPA activities. *Id.* at 37a-38a; see Gov't C.A. Br. 50-51. Instead, the court concluded that claims of inadequate resources could be raised only as a defense in any contempt proceeding that might arise if BLM failed to carry out a duty after being ordered by the district court to do so. App., *infra*, 38a.

b. Senior Judge McKay dissented in part. App., *infra*, 39a-54a. First, he reasoned that Section 706(1) does not provide a vehicle for "claims challenging an agency's overall method of administration or for controlling the agency's day-to-day activities." *Id.* at 43a. He viewed the majority's decision as "essentially transform[ing] § 706(1) into an improper and powerful jurisdictional vehicle to make programmatic attacks on day-to-day agency operations." *Id.* at 46a. Second, he reasoned that Section 706(1) authorizes challenges only to "true agency inaction," not agency efforts that merely "fall[] short of completely achieving the agency's obligations." *Ibid.* Finally, he stated that Section 706(1) does not permit plaintiffs to challenge "an agency's failure to meet each and every goal set out in its land use plans," *id.* at 51a, observing that such challenges "would allow plaintiffs of all varieties to substantially impede an agency's day-to-day operations," *id.* at 50a.[3]

REASONS FOR GRANTING THE PETITION

The court of appeals erred in holding that 5 U.S.C. 706(1) authorizes judicial review of an agency's ongoing administration of a program assigned to it by Congress. That holding rests on a fundamental misunderstanding of what constitutes "agency action" that may properly be the subject of judicial review under the APA; departs substantially from this Court's decision in *Lujan* v. *National Wildlife Federation*, 497 U.S. 871 (1990), concerning the proper scope of judicial review under the APA; and is inconsistent with the Fifth Circuit's decision in *Sierra Club* v. *Peterson*, 228 F.3d 559 (2000) (en banc), cert. denied, 532 U.S. 1051 (2001), which held that a similar programmatic challenge to a federal agency's management of public lands could not be brought under Section 706(1).

Moreover, the Ninth Circuit, in agreement with the Tenth Circuit in this case, recently allowed a comparable programmatic challenge under Section 706(1). See *Montana Wilderness Ass'n.* v. *United States Forest Serv.*, 314 F.3d 1146 (2003). Because the great majority of federal public lands lie in the Ninth and Tenth Circuits, federal agencies that man-

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[3] Judge McKay did not dissent from the court of appeals' holding on the NEPA question. App., *infra*, 39a.

age those lands are now suddenly exposed to the sort of broad programmatic challenges that this Court rejected in *National Wildlife Federation*. And, beyond the land-management context, these decisions permit courts to intrude into a wide array of programs conducted by federal agencies under general statutory standards and internal planning documents. This Court's review is therefore warranted to confine Section 706(1) to its traditional role as an extraordinary remedy to compel an agency to complete a discrete regulatory or adjudicatory task of the sort that, when completed, would be reviewable as final agency action under Section 706(2).

A. Section 706(1) Does Not Provide A Vehicle For Judicial Review Of An Agency's Ongoing Programmatic Activity

The APA does not authorize the federal courts to entertain challenges to anything and everything that an agency may do, or fail to do, in the conduct of its business. The APA instead confines judicial intervention to those instances in which the agency has taken, or has a duty to take, a discrete, clearly identified, and definitive action that carries legal consequences.

1. Section 702 of the APA provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. 702. Section 706, the APA provision principally at issue in this case, defines the scope of such review. As relevant here, Section 706 states that "[t]he reviewing court shall—(1) compel agency action unlawfully withheld or unreasonably delayed; and (2) hold unlawful and set aside agency action, findings, and conclusions found to be" invalid on specified grounds. 5 U.S.C. 706.

Judicial review under the APA is thus limited to "agency action," which the APA defines as "includ[ing] the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. 551(13).[4] All of those examples of "agency action" are discrete products of a focused decision-making process by the agency (*e.g.*, the issuance of a rule, the grant or denial of a license, the imposition of a sanction). The term "the equivalent or denial thereof, or failure to act" is properly understood to refer to similarly discrete actions, under the canon that general terms are known by their more specific companions. See, *e.g.*, *Washington State Dep't of Soc. & Health Servs.* v. *Estate of Keffeler*, 123 S. Ct. 1017, 1025 (2003).

Judicial review under the APA is further limited, absent a specific statute providing otherwise, to "*final* agency action for which there is no other adequate remedy in a court." 5 U.S.C. 704 (emphasis added). This Court has explained that agency action, in order to be "final" and reviewable under the APA, both "must mark the consummation of the agency's decisionmaking process" and "must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett* v. *Spear*, 520 U.S. 154, 177-178 (1997) (internal quotation marks omitted); accord *Franklin* v. *Massachusetts*, 505 U.S. 788, 797-798 (1992).

Such reviewable "final agency action" is readily distinguishable from an agency's day-to-day administration of its programs, as this Court recognized in *National Wildlife Federation*. That case presented a challenge under Section 706(2) of the APA to "the continuing (and thus constantly changing) operations of the BLM" in considering applications

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[4] See, *e.g.*, 5 U.S.C. 551(4) (defining "rule"); 5 U.S.C. 551(6) (defining "order"); 5 U.S.C. 551(8) (defining "license"); 5 U.S.C. 551(10) (defining "sanction"); 5 U.S.C. 551(11) (defining "relief").

to revoke withdrawals of land from the public domain, reviewing classifications of public land, and developing land use plans. 497 U.S. at 890. The Court held that those activities could not be challenged "*wholesale*" under Section 706(2) because they did not constitute "an identifiable 'agency action'—much less a 'final agency action'"—within the meaning of the APA. *Id.* at 890, 891. "Under the terms of the APA," the Court explained, a plaintiff "must direct its attack against some particular 'agency action' that causes it harm," *id.* at 891, and "cannot demand a general judicial review of [an agency's] day-to-day operations," *id.* at 899. See *id.* at 893 ("[T]he flaws in the entire 'program'"—consisting of "many individual actions"—"cannot be laid before the courts for wholesale correction under the APA.").

2. An agency's "day to day operations" no more constitute reviewable "agency action" that may be "compel[led]" under Section 706(1) than they constitute reviewable "agency action" that may be "set aside" under Section 706(2).

Congress intended the term "agency action" to have the same meaning in Section 706(1) as it has in Section 706(2). Congress provided that "[f]or the purpose of this chapter" —*i.e.*, the judicial review provisions of the APA, including both Section 706(1) and Section 706(2)—"'agency action' ha[s] the meaning given[] [it] by section 551 of this title." 5 U.S.C. 701(b)(2). And even aside from Section 701(b)(2), a term is presumed "to mean the same thing throughout a statute," especially "when a term is repeated within a given sentence." *Brown* v. *Gardner*, 513 U.S. 115, 118 (1994). Accordingly, Section 706(1) authorizes a court to compel only the sorts of discrete "agency action" that are described in Section 551(13).

Congress likewise intended Section 704's requirement of "final agency action" to apply to suits under Section 706(1) as well as Section 706(2). Section 704 provides that finality is a condition of "judicial review" under the APA, without distinguishing between review under Section 706(2) of an agency's failures to act (a form of "agency action" under Section 551(13)) and review under Section 706(1) of an agency's affirmative acts. Thus, Section 706(1) authorizes a court to compel only final agency action, *i.e.*, action that is conclusive and that carries legal consequences, see *Bennett*, 520 U.S. at 177-178, and that, if taken by the agency rather than withheld, would be reviewable under Section 706(2).

A court may consequently compel an agency under Section 706(1) to issue a rule (see, *e.g.*, *Public Citizen Health Research Group* v. *Commissioner, Food & Drug Admin.*, 740 F.2d 21, 34-35 (D.C. Cir. 1984)), or to make a "final determination" on an administrative complaint (see, *e.g.*, *Brock* v. *Pierce County*, 476 U.S. 253, 259, 260 n.7 (1986)), or to act on a permit application (see, *e.g.*, *Costle* v. *Pacific Legal Found.*, 445 U.S. 198, 220 n.14 (1980)). A court may not, however, compel an agency to conduct its "day-to-day operations," *National Wildlife Federation*, 497 U.S. at 899, such as its ongoing management of public lands, differently from how they are being conducted.

3. The conclusion that Section 706(1) permits courts to compel only discrete "agency action," as defined in 5 U.S.C. 551(13), is supported by the *Attorney General's Manual on the Administrative Procedure Act* (1947), to which this Court has "repeatedly given great weight" in the interpretation of the APA. *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 218 (1988) (Scalia, J., concurring) (citing cases). In describing Section 706(1) (Clause (A) of Section 10(e) of the APA as enacted in 1946), the *Attorney General's Manual* states:

> Clause (A) authorizing a reviewing court to "compel agency action unlawfully withheld or unreasonably delayed", appears to be a particularized restatement of existing judicial practice under section 262 of the

> Judicial Code (28 U.S.C. 377). *Safeway Stores, Inc.* v. *Brown*, 138 F.2d 278 (E.C.A., 1943), certiorari denied, 320 U.S. 797. The power thus stated is vested in "the reviewing court", which, in this context, would seem to be the court which has or would have jurisdiction to review the final agency action. See *Roche* v. *Evaporated Milk Ass'n.*, 319 U.S. 21, 25 (1943).

Attorney General's Manual 108.

The "existing judicial practice" described in *Safeway Stores* is one permitting a court to compel an agency or official to take a discrete "final action." 138 F.2d at 280. There, the plaintiff sought judicial review of a maximum price regulation promulgated under the Emergency Price Control Act of 1942, contending that the Price Administrator's failure to rule on its protests to the regulation, or even to conduct a hearing on them, should be treated as a denial of the protests. *Id.* at 279. The court held that the governing statute allowed judicial review only after a protest was "actually denied by an overt act of the Administrator." *Id.* at 280. The court went on to observe, however, that a party in the plaintiff's position was not "wholly without remedy in case the Price Administrator improperly delays action upon his protest." *Ibid.* "If the Administrator should unreasonably delay *final action*," the court explained, "it would seem clear that this court, upon a proper showing, may under the authority of Section 262 of the Judicial Code, 28 U.S.C.A. § 377, in aid of its jurisdiction issue an order in the nature of a writ of mandamus directing the Price Administrator to take action upon a pending protest." *Ibid.* (emphasis added). Thus, the *Safeway* court made clear that it could grant mandamus to compel an agency to take action on a discrete matter that had been unreasonably delayed, but only in aid of the court's power to review the "final action" of the agency when it ultimately was issued, not

based on some broader, free-ranging power to oversee agency conduct.

The *Attorney General's Manual*, in stating that the court with jurisdiction to grant relief under Section 706(1) is "the court which has or would have jurisdiction to review the final agency action," proceeds on the same theory and equates the "agency action" that a court may compel under Section 706(1) with the "agency action" that a court may review under Section 706(2). The *Attorney General's Manual* does not contemplate that a court may compel conduct under Section 706(1) of an ongoing programmatic nature.

4. The understanding that Section 706(1) allows courts only to compel discrete "agency action," and not to alter an agency's ongoing course of conduct, is reinforced by the understanding that Section 706(1) allows courts only to grant relief comparable to mandamus. See App., *infra*, 9a-11a & n.5; *id.* at 41a (McKay, J., dissenting in part).

The *Attorney General's Manual* characterizes Section 706(1) as a "codif[cation]" of existing mandamus practice:

> Orders in the nature of a writ of mandamus have been employed to compel an administrative agency to act, *Safeway Stores, Inc.* v. *Brown*, *supra*, or to assume jurisdiction, *Interstate Commerce Commission* v. *United States ex rel. Humboldt Steamship Co.*, 224 U.S. 474 (1912), or to compel an agency or officer to perform a ministerial or non-discretionary act. Clause (A) of section 10(e) [*i.e.*, Section 706(1)] was apparently intended to codify these judicial functions.
>
> Obviously, the clause does not purport to empower a court to substitute its discretion for that of an administrative agency and thus exercise administrative duties. * * * However, as in *Safeway Stores* v. *Brown*,

supra, a court may require an agency to take action upon a matter, without directing how it shall act.

Attorney General's Manual 108. The Senate Judiciary Committee similarly recognized that, under Section 706(1), "[t]he court may require agencies to act, but may not under this provision tell them how to act in matters of administrative discretion." Staff of the Senate Comm. on the Judiciary, 79th Cong., 1st Sess., *Administrative Procedure Act: Legislative History 79th Congress* 40 (Comm. Print 1945).[5]

When a court is asked to compel discrete "agency action" under Section 706(1)—such as the issuance of a regulation or the disposition of an administrative claim—the court may do so without interfering with the agency's discretion. The court simply orders the agency to take the particular action that has been "withheld" or "delayed," without directing what the substance of the action should be. That is not the case, however, when a court is asked to compel an agency to alter its day-to-day administration of a program, such as its management of public lands. In that situation, the question is not whether the agency has taken action at all, but instead is whether the agency's course of conduct is sufficient to satisfy the general standards in the governing statute or regulations. And the relief is not an order compelling the agency *to act* on a discrete matter, but instead is an order directing the agency *how to act* in a broad range of matters that may come before it in the future, *i.e.*, to take steps on a programmatic basis that are different from, or in addition to, the steps that the agency has considered appropriate. Such a

[5] Several courts of appeals, including the Tenth Circuit, have analogized Section 706(1) relief to mandamus relief. See, *e.g.*, *Mt. Emmons Mining Co.* v. *Babbitt*, 117 F.3d 1167, 1170 (10th Cir. 1997); *Independence Mining Co.* v. *Babbitt*, 105 F.3d 502, 507 (9th Cir. 1997); *Potomac Elec. Power Co.* v. *ICC*, 702 F.2d 1026, 1034 (D.C. Cir. 1983).

case almost inevitably requires a court to substitute its discretion for that of the agency, and to do so on a grand scale that is incompatible with the measured regime for judicial review of agency action that Congress put in place in the APA and with the separation of powers on which that regime is based.[6]

5. Equating reviewable "agency action" under Section 706(1) with reviewable "agency action" under Section 706(2) promotes the coherent application of the APA. "Almost any objection to an agency action can be dressed up as an agency's failure to act." *Public Citizen* v. *Nuclear Regulatory Comm'n*, 845 F.2d 1105, 1107 (D.C. Cir. 1988); see *Ecology Ctr., Inc.* v. *United States Forest Serv.*, 192 F.3d 922, 926 (9th Cir. 1999). If "agency action" were to have a more expansive meaning in Section 706(1) than in Section 706(2), a plaintiff could circumvent the limitations on judicial review under Section 706(2) by proceeding instead under Section 706(1). A plaintiff could thereby obtain under Section 706(1) the same sort of "*wholesale* improvement" of an agency program that *National Wildlife Federation* forbids under Section 706(2). Indeed, the very agency conduct found unreviewable under Section 706(2) in *National Wildlife Federation* itself—"failure to revise land use plans in proper fashion, failure to submit certain recommendations to Congress, failure to consider multiple use, * * * failure to provide required public notice, failure to provide adequate environmental impact statements," 497 U.S. at 891—could then be recharacterized and reviewed as agency action

[6] Indeed, several courts have concluded that Section 706(1) authorizes relief "only when there has been a genuine failure to act" by the agency, and not when only the adequacy of the agency's action is at issue. *Ecology Ctr., Inc.* v. *United States Forest Serv.*, 192 F.3d 922, 926 (9th Cir. 1999); accord, *e.g.*, *Sierra Club* v. *Peterson*, 228 F.3d at 568; *Public Citizen* v. *Nuclear Regulatory Comm'n*, 45 F.2d at 1107-1109; *Gillis* v. *Department of Health & Human Servs.*, 759 F.2d 565, 578 (6th Cir. 1985).

"unlawfully withheld or unreasonably delayed" under Section 706(1).

Moreover, if Section 706(1) is properly confined to suits to compel "agency action" of the sort that will be reviewable under Section 706(2) once it becomes final, parties will ordinarily be required to present their requests for such action to the agency in the first instance, see 5 U.S.C. 553(e), rather than go directly to court. The agency then is afforded the opportunity to consider the relevant legal and factual questions, develop an administrative record, and issue a decision on the request to the extent necessary to serve as the basis for any subsequent judicial review. See *Auer* v. *Robbins*, 519 U.S. 452, 459 (1997) (explaining that a complaint about an agency's failure to amend its regulations should have been presented initially to the agency through a petition for rulemaking); *United States* v. *L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952) (objections to how an agency conducts its business should generally be presented to the agency so that it may correct any errors).

By contrast, if suits are allowed under Section 706(1) to challenge alleged failures to satisfy general statutory standards, the courts will be called upon to conduct correspondingly broad-ranging factual inquiries into the manner in which the agency operates on a day-to-day basis, rather than to focus on a discrete "agency action" and the reasons given for that action by the agency itself in its administrative decision. That, in fact, is the very course that SUWA has sought and the court of appeals has endorsed in this case. See App., *infra*, 24a. Similarly, in *Montana Wilderness Association*, 314 F.3d at 1152, the Ninth Circuit remanded for a trial in the district court on whether the Forest Service had administered almost one million acres in seven wilderness study areas to maintain their wilderness character and potential for inclusion in the Wilderness System. The result is to stand the APA on its head by giving Section

706(1)—which was intended to be a narrow avenue of relief available only in extraordinary circumstances to compel performance of a discrete and clearly defined legal duty—the broadest scope of all of the judicial review provisions of the APA.

B. The Court of Appeals Erred In Holding That SUWA's Challenges To BLM's Management Of Off-Road Vehicle Use On Public Lands Are Cognizable Under Section 706(1)

The court of appeals held that BLM could be compelled under Section 706(1) to (i) manage wilderness study areas in Utah "in a manner so as not to impair the suitability of such areas for preservation as wilderness," 43 U.S.C. 1782(c); (ii) take a "hard look" at whether off-road vehicle use on certain public lands requires the preparation of supplemental environmental analyses under NEPA, 42 U.S.C. 4322(2)(C), and (iii) perform certain managerial tasks identified in its land use plans. None of those holdings represents a proper application of Section 706(1) under the standards identified above.

1. The court of appeals erred in concluding that Section 706(1) authorizes judicial review of BLM's "day-to-day management" of the wilderness study areas to assure that FLPMA's general non-impairment requirement is being satisfied. App., *infra*, 16a. As *National Wildlife Federation* explains, an agency's "day-to-day operations," and its management of public lands in particular, do not constitute "an identifiable 'agency action'" under the APA, "much less a 'final agency action.'" 497 U.S. at 890. The Court's reasoning in *National Wildlife Federation*, although directed at a claim under Section 706(2), is equally applicable to SUWA's claim under Section 706(1). The APA does not distinguish between those provisions in confining judicial review to "agency action" and, in the absence of a statute to the

contrary, to "final agency action." Thus, as Judge McKay observed, "review under the APA is strictly reserved for cases addressing *specific instances* of agency action or inaction rather than programmatic attacks." App., *infra*, 42a (McKay, J., dissenting in part).

Nor does the court of appeals' holding with respect to the FLPMA claim comport with the settled understanding that Section 706(1) authorizes only relief comparable to mandamus, *i.e.*, "to require an agency to take action upon a matter, without directing how it shall act." *Attorney General's Manual* 108. Neither SUWA nor the court of appeals disputed that BLM was taking some measures to satisfy FLPMA's non-impairment standard. Accordingly, in order to decide whether SUWA would be entitled to any relief on remand, the district court would have to determine whether those measures are sufficient to meet that very general standard and, if not, to order BLM to take different or additional measures. That approach would involve the court in how the agency exercises its discretion on an ongoing programmatic bases, including the exercise of its law-enforcemen functions with respect to violations of its restrictions on off-road vehicle use. See App., *infra*, 46a (McKay, J., dissenting in part) (any remedy granted in this case "would involve the district court in the ongoing review of every managemen. decision allegedly threatening achievement of the nonimpairment mandate").

2. The court of appeals also erred in concluding that BLM could be compelled under Section 706(1) to take a "hard look" at conditions on the ground to determine whether to prepare supplemental environmental impact statements or environmental assessments under NEPA.

NEPA requires an agency to prepare an environmental impact statement only when it is proposing to undertake a "*major Federal action*[] significantly affecting the quality of the human environment." 42 U.S.C. 4332(2)(C) (emphasis

added). The agency may undertake an environmental assessment to determine whether the proposed action requires an environmental impact statement. 40 C.F.R. 1501.4(b), 1508.9(a)(1), 1508.13. The agency is required to supplement an existing environmental impact statement or environmental assessment only in response to "significant new circumstances or information relevant to environmental concerns *and bearing on the proposed action or its impacts.*" 40 C.F.R. 1502.9(c)(1)(ii) (emphasis added). In that specific context—where the major federal action to which the initial environmental impact statement or environmental assessment was directed has not yet occurred—courts have held that an agency must take a "hard look" at intervening developments to determine whether supplementation is required before the proposed action is taken or completed. See *Marsh* v. *Oregon Natural Res. Council*, 490 U.S. 360, 374 (1989).

An environmental impact statement or environmental assessment is not itself "final agency action" within the meaning of the APA. Standing alone, such NEPA analyses do not establish any rights, obligations, or other legal consequences. See *Bennett*, 520 U.S. at 177-178. They are instead a procedural prerequisite to a particular type of "final agency action"—namely, a decision by the agency to undertake a "major Federal action" that is subject to NEPA. 42 U.S.C. 4332(2)(C). Such "preliminary, procedural, or intermediate agency action" is "not directly reviewable" under the APA, although "it is subject to review on the review of the final agency action." 5 U.S.C. 704. For that reason, an agency's environmental impact statement or environmental assessment—much less an agency's "hard look" at whether even to prepare one—is not the sort of undertaking that may itself be compelled under Section 706(1).

In any event, BLM is not subject to the sort of clear, nondiscretionary duty that may be compelled under Section

706(1) to take a "hard look" at whether to supplement its NEPA analyses for the public lands involved in this case. Such a duty exists only when an agency is proposing to take a "major Federal action," 42 U.S.C. 4332(2)(C), see *Kleppe* v. *Sierra Club*, 427 U.S. 390, 401 (1976), and there is no suggestion that BLM has proposed any "major Federal action" for those lands. SUWA may well believe that BLM *should* take certain action (such as promulgating new regulations governing off-road vehicle use), preceded by an appropriate NEPA analysis, to address the environmental concerns raised in this case. And, if BLM were to take such action, SUWA could seek review of *that* decision, including the NEPA analysis conducted by BLM in connection with it, under *Section 706(2)* provided that ripeness requirements were satisfied. See *Ohio Forestry Ass'n* v. *Sierra Club*, 523 U.S. 726 (1998). But NEPA imposes no free-standing obligation on BLM to conduct an environmental analysis divorced from a proposed "major Federal action," and SUWA has no free-standing right enforceable under Section 706(1) to compel BLM to do so. The court of appeals therefore erred in holding that BLM violated a clear, nondiscretionary duty by electing to conduct its NEPA analysis in connection with—not independently of—its upcoming revisions of land use plans. App., *infra*, 38a.

3. The court of appeals finally erred in concluding that BLM could be ordered under Section 706(1) to perform two tasks—to monitor off-road vehicle use and to complete an off-road vehicle implementation plan—that BLM undertook to perform in its land use plans applicable to two areas. Such tasks are not "final agency action" that may be compelled under Section 706(1).

This Court has characterized the Forest Service's forest plans, which are the functional equivalent of BLM's land use plans, as "tools for agency planning and management," which are "merely programmatic in nature," subject to continuing

revision and refinement, and "often not fully implemented." *Ohio Forestry*, 523 U.S. at 735-737. The Court recognized that such plans, in and of themselves, "do not command anyone to do anything or to refrain from doing anything"; "do not grant, withhold, or modify any formal legal license, power, or authority"; "do not subject anyone to any civil or criminal liability," and "create no legal rights or obligations." *Id.* at 733. The Court therefore held that a challenge to provisions of a forest plan that allowed certain types of logging within a national forest was not ripe for adjudication, because no such logging could occur until the Forest Service rendered a final administrative decision—which would be reviewable final agency action—to permit logging at a specific site. See *id.* at 733-737.

For similar reasons, the managerial tasks that BLM undertakes to perform in its land use plans are not "final agency action" under the APA. A land use plan is not the "consummation of the agency's decisionmaking process," *Bennett*, 520 U.S. at 177-178 (internal quotation marks omitted), with respect to any site-specific action in the area covered by the plan. Nor does a land use plan create any legal rights or obligations. *Id.* at 178; see *Ohio Forestry*, 523 U.S. at 733. In the portions of the land use plans at issue here, for example, BLM agreed to monitor off-road vehicle use in one area and to prepare an off-road vehicle plan for another area. BLM's performance of those tasks would not "alter the legal regime," *ibid.*, in any respect concerning off-road vehicle use in those areas. It would, at most, provide information or analysis to assist BLM in taking future "final agency action" that would, in turn, have legal consequences for persons seeking to use the affected lands, such as the opening or closing of particular areas to off-road vehicle use. It is such "final agency action" at the end of the decisionmaking process that would be the basis for judicial review under Section 706(2), not the antecedent monitoring and

planning activities that SUWA seeks to compel in this case under Section 706(1).

Nor does FLPMA's provision that "[t]he Secretary shall manage the public lands * * * in accordance with the land use plan developed by him," 43 U.S.C. 1732(a), suggest that the management tasks described in land use plans are judicially enforceable directly and in their own right. Rather, as relevant here, that provision simply prevents BLM "from approving or undertaking affirmative projects inconsistent with its land use plans." App., *infra*, 49a (McKay, J., dissenting in part); see 43 C.F.R. 1610.5-3(a) ("All future resource management authorizations and actions, as well as budget or other action proposals to higher levels in the Bureau of Land Management and Department, and subsequent more detailed or specific planning, shall conform to the approved plan."). If BLM proposes a site-specific action that is inconsistent with the plan, a person adversely affected may pursue an administrative challenge, see 43 C.F.R. 1610.5-3(b), and seek judicial review of BLM's final decision on that discrete proposal. See *Ohio Forestry*, 523 U.S. at 732-737. Nothing in BLM's regulations, however, confers a right on any private person to challenge alleged deficiencies in BLM's day-to-day managerial performance under land use plans, including the conduct of monitoring and subsidiary planning activities such as those that are the subject of SUWA's challenge.[7]

[7] The court of appeals relied on 43 C.F.R. 1601.0-5(c) for the proposition that BLM has a judicially enforceable duty to complete all oversight and managerial tasks contemplated in a land use plan. See App., *infra*, 26a, 29a. That regulation, however, is simply a *definition* of the word "consistent," which, in turn, is used as part of the definition of "conformity" or "conformance" in 43 C.F.R. 1601.0-5(b). Neither definition addresses whether BLM must perform general tasks referenced in land use plans, much less imposes an enforceable legal obligation on BLM to do so, as the court of appeals believed. Moreover, the regulation (quoted at p. 24, *supra*) that identifies the agency activities that, when BLM decides to undertake them, must "conform" to the land use plan refer only to "future resource management authorization and actions" (*i.e.*, discrete final agency actions, which SUWA has not challenged in this case) and to budget or other proposals to higher officials and "subsequent more detailed or specific planning" (*i.e.*, planning and programmatic measures, which are not final agency action and therefore are not subject to judicial review under the APA). See 43 C.F.R. 1610.5-3(a).

C. Review By This Court Is Warranted To Decide Whether Section 706(1) May Be Invoked To Challenge An Agency's Ongoing Management Of Public Lands And Other Programs

The courts of appeals are divided on whether Section 706(1) furnishes a basis for a programmatic challenge of the sort brought by SUWA here. Contrary to the Tenth Circuit in this case, the Fifth Circuit, sitting en banc, has held that Section 706(1) does not authorize judicial review of an agency's day-to-day management of public lands. *Sierra Club* v. *Peterson*, 228 F.3d at 569.

In *Sierra Club*, the plaintiffs filed suit under Section 706(1) and Section 706(2) of the APA to challenge the Forest Service's management of timber resources under the National Forest Management Act of 1976 (NFMA), 16 U.S.C. 1600 *et seq.*, and specifically its "entire program of allowing timber harvesting in the Texas forests." 228 F.3d at 563. The Fifth Circuit, relying on *National Wildlife Federation*, held that the suit was not cognizable under Section 706(2), because the plaintiffs were advancing a "programmatic challenge[]," not a challenge to "a specific and final agency action." *Id.* at 565-566. "[A]s in *Lujan* [v. *National Wildlife Federation*]," the court explained, the plaintiffs had "impermissibly attempted to 'demand a general judicial review of the [Forest Service's] day-to-day

operations.'" *Id.* at 566 (quoting *National Wildlife Federation*, 497 U.S. at 899).

The Fifth Circuit then held that the plaintiffs' challenge also was not cognizable under Section 706(1) on "the alternative theory that the Forest Service 'failed to act'" to protect timber resources. 228 F.3d at 568. The court acknowledged that, "[i]n certain circumstances, agency inaction may be sufficiently final to make judicial review appropriate." *Id.* at 568. The court explained, however, that "[t]he Forest Service's alleged failure to comply with the NFMA in maintaining Texas's national forests * * * does not reflect agency inaction." *Ibid.* "Instead," the court continued, "the Forest Service has been acting, but the [plaintiffs] simply do not believe its actions have complied with the NFMA." *Ibid.*

In contrast, the Ninth Circuit, consistent with the Tenth Circuit here, has permitted challenges under Section 706(1) to an agency's ongoing management of public lands. *Montana Wilderness Ass'n*, 314 F.3d at 1150-1152. There, the plaintiffs contended that the Forest Service was violating the Montana Wilderness Study Act of 1997, Pub. L. No. 95-150, 91 Stat. 1243, which requires that wilderness study areas in Montana be managed to maintain their wilderness character. The Ninth Circuit held that the suit was not cognizable under Section 706(2), because the Forest Service's challenged conduct "does not fit into any of the statutorily defined categories for agency action," 314 F.3d at 1150 (citing *National Wildlife Federation*, 497 U.S. at 899), and "does not 'mark the consummation of the [Forest Service's] decisionmaking process,'" *ibid.* (quoting *Bennett*, 520 U.S. 177). The court nonetheless held that the suit was cognizable under Section 706(1). The court reasoned that "[t]he simple fact that the Forest Service has taken some action to address the Act is not sufficient to remove the case from section 706(1) review." *Id.* at 1151. Accord *Center for Biological Diversity* v. *Veneman*, No. 02-16201, 2003 WL 21517980 (9th Cir. July 7, 2003) (holding that an agency could be compelled under Section 706(1) to inventory rivers to assess their suitability for inclusion in the Wild and Scenic Rivers System while recognizing that such an inventory would not constitute final agency action reviewable under Section 706(2)).

* * * * *

This Court's review is warranted in order to make clear that an agency's ongoing programmatic activities are not subject to judicial review under Section 706(1), just as they are not subject to judicial review under Section 706(2); to resolve the inconsistency between this Court's holding in *National Wildlife Federation* and the Tenth Circuit's holding in this case regarding what constitutes reviewable "agency action" and the scope of judicial review under the APA; and to eliminate the disagreement among the courts of appeals as to when Section 706(1) may appropriately be invoked.

This Court has considered similar questions when, as here, a court of appeals has remanded a case to entertain a broad programmatic challenge to agency conduct. See, *e.g.*, *National Wildlife Federation*, 497 U.S. at 881-882; see also *Kleppe*, 427 U.S. at 395-396. Review by this Court is warranted to avoid extended proceedings in the lower courts in this case and others, during which the ability of BLM and the Forest Service to manage public lands throughout the West could be significantly disrupted. The limitations on judicial review under the APA have the critical function of preventing disruption of and judicial intrusion into ongoing agency decision-making and management—and thereby giving effect to the separation of powers under the Constitution. Those limitations therefore must be enforced at the

outset of litigation, as the district court (now reversed by the court of appeals) did in this case.

The question presented in this case is an important and recurring one. The question has thus far arisen principally in the context of challenges to an agency's management of public lands—more than 90% of which lie in the Ninth and Tenth Circuits, which have held that such challenges are cognizable under Section 706(1). The question also has the potential to arise in many other contexts in which plaintiffs may seek to alter an agency's ongoing administration of its programs. See App., *infra*, 43a-44a &n.3 (McKay, J., dissenting in part) (suggesting other such contexts). Whatever the particular context, the use of Section 706(1) endorsed in this case permits courts to engage in wide-ranging review of an agency's entire course of conduct, to order systemic changes in an agency's day-to-day operations that were not even sought from the agency in the first instance, and to divert scarce resources from the activities chosen by the agency, taking into account all relevant interests, to the activities preferred by the most litigious plaintiffs. As this Court recognized in *National Wildlife Federation*, however, plaintiffs "cannot seek *wholesale* improvement of [an agency's] program by court decree, rather than in the offices of the Department or the halls of Congress, where programmatic improvements are normally made." 497 U.S. at 891. This Court's review is needed in order to make clear that this principle applies under Section 706(1) as under Section 706(2).

CONCLUSION

The petition for a writ of certiorari should be granted.
Respectfully submitted.

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JULY 2003

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 01-4009

SOUTHERN UTAH WILDERNESS ALLIANCE, A UTAH NON-PROFIT CORPORATION; THE WILDERNESS SOCIETY, A NATIONAL NON-PROFIT CORPORATION; SIERRA CLUB, A CALIFORNIA NON-PROFIT CORPORATION; GREAT OLD BROADS FOR WILDERNESS, A UTAH NON-PROFIT CORPORATION; WILDLANDS CPR, A MONTANA NON-PROFIT CORPORATION; UTAH COUNCIL OF TROUT UNLIMITED, A UTAH NON-PROFIT ORGANIZATION; AMERICAN LANDS ALLIANCE, A NATIONAL NON-PROFIT CORPORATION; AND FRIENDS OF THE ABAJOS, A UTAH NON-PROFIT CORPORATION, PLAINTIFFS-APPELLANTS

v.

GALE NORTON, SECRETARY, UNITED STATES DEPARTMENT OF THE INTERIOR; NINA ROSE HATFIELD, ACTING DIRECTOR, BUREAU OF LAND MANAGEMENT; AND BUREAU OF LAND MANAGEMENT, DEFENDANTS-APPELLEES,

STATE OF UTAH; SAN JUAN COUNTY; EMERY COUNTY; THE SCHOOL AND INSTITUTIONAL TRUST LANDS ADMINISTRATION; KANE COUNTY; WAYNE COUNTY, UTAH; UTAH SHARED ACCESS ALLIANCE, A UTAH NON-PROFIT CORPORATION; BLUE RIBBON COALITION, AN IDAHO NON-PROFIT CORPORATION; ELITE MOTORCYCLE TOURS, A UTAH CORPORATION; AND ANTHONY CHATTERLEY, DEFENDANTS-INTERVENORS-APPELLEES

Aug. 29, 2002

Before EBEL, MCKAY, and LUCERO, Circuit Judges.

EBEL, Circuit Judge.

The Southern Utah Wilderness Alliance and a number of other organizations (collectively, SUWA) brought suit in the United States District Court for the District of Utah against the Bureau of Land Management (BLM), alleging, among other claims, that the BLM violated the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. § 1701 et seq., and the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 et seq., by not properly managing off-road vehicle and/or off-highway vehicle (collectively, ORV) use on federal lands that had been classified by the BLM as Wilderness Study Areas (WSAs) or as having "wilderness qualities." SUWA sought relief under the Administrative Procedure Act (APA), 5 U.S.C. § 551 et seq., claiming that the BLM should be compelled under § 706(1) of the APA to carry out mandatory, nondiscretionary duties required by the FLPMA and NEPA. *See* 5 U.S.C. § 706(1). The district court rejected SUWA's arguments and dismissed the relevant claims for want of subject matter jurisdiction. In reaching this conclusion, the district court reasoned that as long as an agency is taking some action toward fulfilling mandatory, nondiscretionary duties, agency action may not be compelled pursuant to § 706(1). The district court also suggested that the BLM could not be compelled to comply with provisions in a land use plan (LUP) promulgated pursuant to the FLPMA unless or until the BLM undertook or authorized an "affirmative project[]" that

conflicted with a specific LUP requirement. Finally, the court concluded that the BLM did not abuse its discretion in determining that a supplemental Environmental Impact Statement (SEIS) was not necessary based on new information about increased ORV use.

Exercising jurisdiction pursuant to 28 U.S.C. § 1291, we REVERSE and REMAND. Our remand, however, is a narrow one, concluding only that the district court erred in dismissing this case for lack of subject matter jurisdiction and in concluding, at the motion to dismiss stage, that SUWA failed to state a claim that the BLM had a duty to consider a SEIS based on new circumstances. The merits of the claim will need to be addressed on remand.

I. *Procedural Background*

On October 27, 1999, SUWA filed suit in the district court alleging that the BLM had "failed to perform its statutory and regulatory duties" by not preventing harmful environmental effects associated with ORV use. On November 24, 1999, a group of ORV users (the Recreationists) filed a motion to intervene in the suit, which the district court subsequently granted. Two months after the district court allowed the Recreationists to intervene, SUWA filed a second amended complaint that asserted ten causes of action against the BLM and that sought to have the court compel agency action under § 706(1) of the APA. Three of these claims—that the BLM failed to comply with the FLPMA, refused to implement provisions of various land management plans, and did not take a "hard look" under NEPA at increased ORV use—are relevant to this appeal and will be discussed individually below.

SUWA then moved for a preliminary injunction "to protect nine specific areas from further ORV damage." The Recreationists responded to this motion by arguing that the claims were not actionable under § 706(1) and should be dismissed under Rule 12(b)(1) of the Federal Rules of Civil Procedure for lack of subject matter jurisdiction. On December 22, 2000, the district court denied SUWA's preliminary injunction request and granted the BLM's motion to dismiss. The court then certified the dismissed claims as final judgments under Rule 54(b) of the Federal Rules of Civil Procedure, and this appeal followed.[1]

II. *Standard of Review*

A district court's dismissal of claims under Rule 12(b)(1) is reviewed de novo. *United Tribe of Shawnee Indians v. United States*, 253 F.3d 543, 547 (10th Cir. 2001); *SK Fin. v. La Plata County*, 126 F.3d 1272, 1275

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[1] SUWA filed its notice of appeal before the district court certified the dismissed claims for appeal under Rule 54(b). On February 5, 2001, this court issued a show cause order informing the parties that unless the district court either certified the dismissed claims under Rule 54(b) within thirty days or explicitly adjudicated the remaining claims within thirty days, the appeal would be dismissed. On February 9, 2001, the district court issued Rule 54(b) certification, and, upon receipt of the district court order, the question of appellate jurisdiction was referred to the panel hearing the merits of this case. Given that the parties obtained Rule 54(b) certification within thirty days of our show cause order, the premature notice of appeal is "deemed to [have] ripen[ed] as of the date of certification," and we have "jurisdiction over the appeal." *United States v. Hardage*, 982 F.2d 1491, 1494 (10th Cir. 1993); *cert. denied*, 516 U.S. 1009, 116 S. Ct. 565, 133 L. Ed. 2d 490 (1995); *see Kelley v. Michaels*, 59 F.3d 1055, 1057 (10th Cir. 1995); *Lewis v. B.F. Goodrich Co.*, 850 F.2d 641, 645-46 (10th Cir. 1988) (en banc).

(10th Cir. 1997). Any factual determinations made by the district court in making its jurisdictional ruling are reviewed for clear error. *United Tribe*, 253 F.3d at 547.

III. *FLPMA Claim under § 706(1) of the APA*

SUWA's first argument on appeal is that the district court's conclusion that § 706(1) of the APA did not give it subject matter jurisdiction over its FLPMA-based claims was erroneous. The core of SUWA's argument is that the FLPMA imposes a mandatory, nondiscretionary duty on the BLM to manage WSAs in such a way that their wilderness values are not impaired. Ongoing ORV use, they allege, is impairing these values, and, therefore, they claim that the BLM must be compelled to prevent impairment caused by ORV use. For the reasons discussed below, we conclude that the BLM has a mandatory, nondiscretionary duty to manage the WSAs in accordance with the FLPMA's nonimpairment requirement. We further conclude that, on the record before us, SUWA has presented a colorable claim that the BLM's present management of the disputed WSAs may be violating the FLPMA's mandate. Consequently, we reverse the district court's dismissal of SUWA's "nonimpairment claim" for want of subject matter jurisdiction under § 706(1).

A. *FLPMA*

In 1976, Congress enacted the FLPMA, a "complex" and "comprehensive" statute that created a "versatile framework" for governing the BLM's management of public lands. *Rocky Mountain Oil & Gas Ass'n v. Watt*, 696 F.2d 734, 737-38 (10th Cir. 1982). The Act required that the Secretary of the Interior "prepare and maintain on a continuing basis an inventory of all public lands and their resource and other values." 43 U.S.C.

§ 1711(a); *see Utah v. Babbitt*, 137 F.3d 1193, 1198 (10th Cir. 1998); *Rocky Mountain Oil & Gas*, 696 F.2d at 740. During this inventory process, the Secretary was to identify "roadless areas of five thousand acres or more and roadless islands of the public lands" that possessed "wilderness characteristics."[2] 43 U.S.C. § 1782(a). The process of identifying lands as having wilderness characteristics involved two steps. First, the BLM conducted an "initial inventory," during which it "identif[ied] wilderness inventory units, which were defined as roadless areas of 5000 acres or more that *may* have wilderness characteristics." *Utah*, 137 F.3d at 1198 (internal quotation marks omitted; emphasis added). After completing this initial inventory, the BLM then conducted an "intensive inventory of these units to determine whether the units possessed wilderness characteristics." *Id.* (internal quotation marks omitted). Areas found by the BLM to possess wilderness characteristics were then designated by the BLM as Wilderness Study Areas, or WSAs.[3] *Id.*; *Sierra Club v.*

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[2] The FLPMA incorporates the Wilderness Act of September 3, 1964's definition of "wilderness." *See* 43 U.S.C. § 1782(a). That act, in relevant part, defines "wilderness" as an area of undeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habitation, . . . which (1) generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable; (2) has outstanding opportunities for solitude or a primitive and unconfined type of recreation; (3) has at least five thousand acres of land or is of sufficient size to make practicable its preservation and use in an unimpaired condition; and (4) may also contain ecological, geological, or other features of scientific, educational, scenic, or historical value. 16 U.S.C. § 1131(c).

[3] In 1980, the BLM designated 2.5 million acres of federal land in Utah as WSAs. *See* 45 Fed. Reg. 75,602, 75,603 (Nov. 14, 1980). Four areas designated as WSAs are at issue in this case: Moquith

Hodel, 848 F.2d 1068, 1085 (10th Cir. 1988), *overruled on other grounds by Vill. of Los Ranchos de Albuquerque v. Marsh*, 956 F.2d 970 (10th Cir. 1992) (en banc). The Act mandated that, within fifteen years of the FLPMA's enactment, the Secretary review the WSAs and recommend to the President which WSAs would be suitable for "preservation as wilderness." 43 U.S.C. § 1782(a). The FLPMA required that, two years after receiving the Secretary's report, the President submit to Congress "his recommendations with respect to designation as wilderness of each such area." § 1782(b).

The FLPMA, however, provides that only Congress may actually designate land for wilderness preservation. *Id.* Consequently, until Congress either affirmatively designates or expressly rejects a particular WSA for wilderness preservation, the FLPMA mandates that the BLM "*shall continue* to manage" the WSAs "in a manner so as *not to impair* the suitability of such areas for preservation as wilderness." § 1782(c) (emphasis added); *see also Hodel*, 848 F.2d at 1085 (explaining the BLM's obligation to preserve WSAs); *Sierra Club v. Clark*, 774 F.2d 1406, 1408 (9th Cir. 1985) (discussing how areas designated for preservation must not be impaired). Thus, once land is designated as an WSA, the FLPMA imposes an immediate and continuous obligation on the BLM to manage such parcels in such a way that they will remain eligible for wilderness classification should Congress decide to designate the areas for permanent wilderness preservation.[4] *Hodel*,

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Mountain, Parunuweap Canyon, Sid's Mountain, and Behind the Rocks.

[4] The FLPMA does not explain what the terms "preservation," "wilderness," or "impair" mean. The BLM, however, has interpreted this "nonimpairment" mandate in a document entitled the

Interim Management Policy for Lands Under Wilderness Review (IMP), which was issued as a federal regulation at 44 Fed. Reg. 72,014. *See Hodel*, 848 F.2d at 1086; *see also Rocky Mountain Oil & Gas*, 696 F.2d at 739 n.6 (explaining that the IMP was "promulgated using notice and comment procedures"). Courts give deference to the BLM's interpretation of the FLMPA, as expressed in the IMP, particularly where language in the FLMPA is ambiguous. *See Hodel*, 848 F.2d at 1087 (deferring to the IMP's reconciliation of tensions within the FLPMA); *Clark*, 774 F.2d at 1409-10 (deferring to the BLM's interpretation of the FLMPA as announced in the IMP); *Rocky Mountain Oil & Gas*, 696 F.2d at 745 ("Where the [FLMPA] is ambiguous, we must afford deference to the interpretation given the statute by the agency charged with its administration.").

According to the IMP, "Management to the nonimpairment standard does not mean that the lands will be managed as though they had already been designated as wilderness." Rather the nonimpairment standard requires the BLM "to ensure that each WSA satisfies [the definition of wilderness] at the time Congress makes a decision on the area." "The Department therefore has a responsibility to ensure that the existing wilderness values of *all* WSAs . . . are not degraded so far, compared with the areas's values for other purposes, as to significantly constrain the Congress' prerogative to either designate a WSA as a wilderness or release it for other uses" (emphasis in original).

As part of the nonimpairment mandate, the IMP mandates that the BLM may only authorize "non-impairing" activity in the WSAs. Under the IMP, use of WSA land will be considered "non-impairing" if two criteria are met. First, the use must be temporary in nature, meaning that it does not "*create surface disturbance* or involve permanent placement of structures" (emphasis added). The IMP defines "surface disturbance" as "any new disruption of the soil or vegetation which would necessitate reclamation." Second, after the activity terminates, "the wilderness values must not have been degraded so far as to significantly constrain the Congress's prerogative regarding the area's suitability for preservation as wilderness."

848 F.2d at 1085; *Interim Management Policy for Lands Under Wilderness Review* (IMP) at 5 (Aplt. App. at 192).

B. *706(1) of the APA*

Section 706(1) of the APA provides that federal courts "shall" "compel agency action unlawfully withheld or unreasonably delayed."[5] 5 U.S.C. § 706(1); *see*

[5] Although the district court indicated that its disposition of this case would have been the same regardless of whether the SUWA suit was characterized as one seeking to compel "unreasonably delayed" action or "unlawfully withheld" action, it concluded that SUWA's claim amounted to one alleging an unreasonable delay. The district court, invoking our decision in *Forest Guardians v. Babbitt*, 174 F.3d 1178 (10th Cir. 1999), reasoned that this action fell under the "unreasonably delayed" category because "there are no 'date-certain deadlines' by which [the] BLM's ORV management must operate." Unlike the district court, we believe that SUWA's nonimpairment claims fall in the "unlawfully withheld" category.

We explained in *Forest Guardians* that "if an agency has no concrete deadline establishing a date by which it must act, and instead is governed only by general timing provisions . . ., a court must compel only action that is delayed unreasonably. Conversely, when an entity governed by the APA fails to comply with a statutorily imposed absolute deadline, it has unlawfully withheld agency action and courts, upon proper application, must compel the agency to act." 174 F.3d at 1190.

As discussed above, the FLPMA imposes an immediate and continuous obligation on the BLM to manage a parcel designated as a WSA in such a way that its wilderness values are not impaired and the land always remains eligible for designation as permanent wilderness areas at any moment Congress might decide to give them that status. *See* 43 U.S.C. § 1782(c). We conclude that Congress did impose an absolute deadline by which the BLM has to prevent impairment because this duty begins the moment the land is designated as a WSA and continues until Congress makes a decision regarding permanent wilderness designation. While Congress did

also Forest Guardians v. Babbitt, 174 F.3d 1178, 1187 (10th Cir. 1999) ("Through § 706 Congress has stated unequivocally that courts *must* compel agency action unlawfully withheld or unreasonably delayed" (emphasis added).); *Marathon Oil Co. v. Lujan*, 937 F.2d 498, 500 (10th Cir. 1991) ("Administrative agencies do not possess the discretion to avoid discharging the duties that Congress intended them to perform.").

Under either the "unreasonably delayed" or "unlawfully withheld" prongs of § 706(1), federal courts may order agencies to act only where the agency fails to carry out a mandatory, nondiscretionary duty.[6] *Forest*

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not state this deadline in a date specific manner, it nonetheless created a deadline: the time when Congress makes the decision on wilderness designation.

[6] Courts have often explained that the standards for compelling agency action through a writ of mandamus and through § 706(1) are very similar, even though the availability of relief under the APA precludes mandamus relief. *See, e.g., Mt. Emmons Mining Co. v. Babbitt*, 117 F.3d 1167, 1170 (10th Cir. 1997) ("The availability of a remedy under the APA technically precludes [a] request for a writ of mandamus, although the mandatory injunction is essentially in the nature of mandamus relief" (citations omitted).); *Yu v. Brown*, 36 F. Supp. 2d 922, 928-29 (D.N.M. 1999) ("Seeking to harmonize the Mandamus Statute with the APA, the Tenth Circuit has held that, since mandamus requires that no other remedy be available and the APA provides a means of challenging . . . agency action, technically mandamus relief is no longer available in such cases. However, the court has also recognized [the similarity between mandamus relief and relief under the APA]" (citation omitted).); *see also Independence Mining Co. v. Babbitt*, 105 F.3d 502, 506-07 (9th Cir. 1997) (analyzing a mandamus claim under § 706(1) because of similarities in the relief). There is, however, an important distinction between compelling agency action through a writ of mandamus and through § 706(1). Even if a party shows that the "prerequisites [for a writ of mandamus] have been met, a court still exercises its *own discretion in deciding whether or not to issue the writ.*" *Marquez-Ramos v. Reno*, 69 F.3d 477, 479 (10th Cir. 1995) (emphasis added); *see also Marathon Oil*, 937 F.2d at 500 ("[T]he issuance of the writ is a matter of the issuing court's discretion."). By contrast, once a court determines that an agency "unlawfully withheld" action, the APA requires that courts compel agency action. *Forest Guardians*, 174 F.3d at 1187-88 (explaining that the use of the word "shall" in § 706 means courts "*must* compel agency action unlawfully withheld").

Guardians, 174 F.3d at 1187-88. By contrast, if a duty is not mandated, or if an agency possesses discretion over whether to act in the first instance, a court may not grant relief under § 706(1). *Id.* at 1187-89.

Importantly, compelling agency action is distinct from ordering a particular outcome. Courts have regularly held that an agency may be required to take action and make a decision even if the agency retains ultimate discretion over the outcome of that decision. In *Mt. Emmons Mining Co. v. Babbitt*, 117 F.3d 1167 (10th Cir. 1997), for example, this court rejected the Secretary of the Interior's claim that he could not be compelled to process a mining patent application because it was not clear that the parties were "unquestionably entitled to a patent." *Id.* at 1172. Instead, we held that the Secretary could be ordered to comply with statutorily-mandated processing requirements even if the Secretary ultimately had discretion over whether to approve the application. *Id.; see also Marathon Oil*, 937 F.2d at 500 (upholding district court order to process applications but reversing order instructing approval of applications as exceeding court's authority); *Estate of Smith v. Heckler*, 747 F.2d 583, 591 (10th Cir. 1984) (ordering the Secretary of Health and Human Services to promulgate regulations).

C. *Analysis of FLPMA Claim*

SUWA acknowledges that the BLM possesses considerable discretion over how it might address activity causing impairment. Nonetheless, SUWA argues that the BLM can be ordered to comply with the FLPMA's nonimpairment mandate, even if the BLM retains discretion over the means of prevention.

The BLM and the Recreationists respond by offering several reasons as to why ORV use in the relevant lands is not subject to § 706(1) review and cannot be considered impairment. First, they argue that the IMP's nonimpairment mandate "affords BLM discretion in not only *how* it will act, but also *whether* it will act," thus removing the agency's inactions from review under § 706(1). Second, the Appellees, particularly the BLM, contend that § 706(1) may only be invoked where "final, legally binding actions . . . have been unlawfully withheld or unreasonably delayed." Third, assuming the BLM has a mandatory duty to prevent ORV-caused impairment, they argue that SUWA's claim is, in reality, a challenge to the sufficiency of the BLM's efforts to prevent impairing activity caused by ORV use rather than a claim that the BLM has failed to act. Undertaking our de novo review, we first address the arguments raised by the BLM and the Recreationists.

1. *Discretion under Nonimpairment Mandate*

As touched on above, the BLM first argues that the district court's dismissal of SUWA's impairment [claim] for lack of subject matter jurisdiction claims was proper because the BLM has "considerable discretion . . . to determine both what constitutes impairment and what action to take if it finds that impairment is occurring or is threatened."

The BLM's argument, however, misses the narrow jurisdictional issue presented on appeal, i.e., whether the BLM has a nondiscretionary, mandatory duty that it may be compelled to carry out under § 706(1). Neither side seriously disputes that the BLM has such a duty under the FLPMA, which mandates that the BLM manage WSAs in such a way as not to impair their wilderness values. *See* 43 U.S.C. § 1782(c). In this case, the district court conceded that SUWA offered colorable evidence suggesting that ongoing ORV activity in the WSAs has seriously impaired the wilderness values of the WSAs at issue, acknowledging in its decision that SUWA had "presented significant evidence about the alleged impairment that is occurring in the WSAs due to ORV use."

Certainly, the BLM is correct in arguing, as it does on appeal and as it did before the district court, that we must give considerable deference to its interpretation of the nonimpairment mandate, *see Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512, 114 S. Ct. 2381, 129 L. Ed. 2d 405 (1994); *Lamb v. Thompson*, 265 F.3d 1038, 1047 (10th Cir. 2001); *Kurzet v. Comm'r*, 222 F.3d 830, 844 (10th Cir. 2000), particularly as laid out in the *Interim Management Policy for Lands Under Wilderness Review* (IMP), a BLM-promulgated regulation that significantly interprets the FLPMA's nonimpairment mandate. *See Hodel*, 848 F.2d at 1087; *Rocky Mountain Oil & Gas*, 696 F.2d at 745. As we have previously explained, as long as "an agency's interpretation of its own regulations does not violate the Constitution or a federal statute, it must be given controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Mission Group Kan., Inc. v. Riley*, 146 F.3d 775, 780 (10th Cir. 1998) (internal quota-

tion marks omitted). Similarly, the BLM is correct that, to the extent the IMP and the FLPMA give it substantial discretion in deciding how it will implement the FLPMA's nonimpairment mandate and address potentially impairing activities, a court's ability to compel it to take specific steps to prevent impairment is curtailed, *see, e.g., Mt. Emmons*, 117 F.3d at 1172; *Marathon Oil*, 937 F.2d at 500, a point SUWA concedes.

The BLM's arguments, however, go to the *merits* of the present suit, and to the *possible remedy* if impairment is found, not to whether federal courts possess *subject matter jurisdiction* under the APA to order the BLM to comply with the FLPMA's nonimpairment mandate. The BLM seems to confuse the principle that, when deciding *whether* an area is being impaired, courts must give deference to the BLM's interpretation of the FLMPA's nonimpairment mandate, with the statutory standard making the nonimpairment obligation mandatory. Similarly, the BLM appears at times to assume erroneously that because it possesses discretion over the *implementation* of the nonimpairment mandate, the nonimpairment obligation is itself wholly discretionary. We do not address on this appeal whether ORV use in the region is impairing the WSA's wilderness values. Upon remand, the district court will have to address that issue after analyzing the evidence before it and giving appropriate deference to the IMP. Such deference and discretion do not, however, immunize the BLM from its clear, nondiscretionary duty "to manage such lands . . . so as not to impair the suitability of such areas for preservation as wilderness," 43 U.S.C. § 1782(c), as compelled by § 706(1).[7] Should, therefore,

[7] The IMP gives specific attention to ORV use when discussing impairing activity. For example, the IMP specifically notes that "[c]ross-country vehicle use off boundary roads and existing ways" constitutes surface disturbance—specifically defined as "impairing" activity under the IMP—because "the tracks created by the vehicles leave depressions or ruts, compact the soils, and trample or compress vegetation." The regulation also holds that vehicles may not drive off "existing trails" except (1) in emergency situations, (2) by state or federal officials to protect human life, safety, and property, (3) where the area was designated for ORV use prior to FLPMA, or (4) where the vehicle will be traversing on sand dunes or snow areas that have been designated for that type of recreational activity. Similarly, the IMP indicates that recreational activities normally permitted within WSAs may be restricted if they "depend upon cross-country uses of motor vehicles."

the district [court] conclude that the alleged ORV use represents a failure by the BLM to manage the disputed WSAs in accordance with the FLPMA's nonimpairment mandate, it must compel the agency to comply with its legal duty. *Forest Guardians*, 174 F.3d at 1187.

2. *Final Action Argument*

On appeal, the BLM also asserts that § 706(1) only applies to "final, legally binding actions that have been unlawfully withheld or unreasonably delayed." Apparently, the BLM believes that a court may only compel agency action under § 706(1) if the unlawfully withheld action would itself be considered a "final" action under § 704 of the APA, which limits judicial review to final agency actions.[8] 5 U.S.C. § 704. According to the BLM,

[8] Section 704 defines the limits of federal courts' power to review actions by administrative agencies, declaring, "Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." 5 U.S.C. § 704. Agency action, in turn, is defined as including "the whole or a part of agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." *Id.*

§ 706(1) is not available for "day-to-day management actions," which, in its view, includes dealing with the ORV use at issue in this case. In essence, the BLM seems to argue that, because it could prevent impairment by ORV use through steps that might not themselves be considered a final agency action, federal courts lack subject matter jurisdiction under § 706(1) over these "day-to-day" decisions.

We find the BLM's finality argument unpersuasive, for it seems to read finality in an inappropriately cramped manner. Contrary to the implications of the BLM's argument, the APA treats an agency's inaction as "action." 5 U.S.C. § 551(13) (defining "agency action" as including a "failure to act"). Where, as here, an agency has an obligation to carry out a mandatory, nondiscretionary duty and either fails to meet an established statutory deadline for carrying out that duty or unreasonably delays in carrying out the action, the failure to carry out that duty is itself "final agency action." Once the agency's delay in carrying out the action becomes unreasonable, or once the established statutory deadline for carrying out that duty lapses, the agency's inaction under these circumstances is, in essence, the same as if the agency had issued a final order or rule declaring that it would not complete its legally required duty. *See Coalition for Sustainable Res., Inc. v. United States Forest Serv.*, 259 F.3d 1244, 1251 (10th Cir. 2001) (explaining circumstances in which agency inaction may be considered "final"); *Sierra Club v. Thomas*, 828 F.2d 783, 793 (D.C. Cir. 1987) ("[I]f an agency is under an unequivocal statutory duty to act,

§ 551(13); *see also Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 882, 110 S. Ct. 3177, 111 L. Ed. 2d 695 (1990) (explaining definition of agency action).

failure to so act constitutes, in effect, an affirmative act that triggers 'final agency action' review."). *Cf.* Daniel P. Selmi, *Jurisdiction To Review Agency Inaction Under Federal Environmental Law*, 72 Ind. L.J. 65, 99-101 (1996) (discussing constructive final agency action); Peter H.A. Lehner, Note, *Judicial Review of Administrative Inaction*, 83 Colum. L. Rev. 627, 652-55 (1983) (explaining that finality may be found when an agency fails to act by a statutorily imposed deadline or unreasonably delays acting). Consequently, contrary to the BLM's argument, the Bureau's alleged failure to comply with the FLPMA's nonimpairment mandate can be considered a final action under § 704 that is subject to compulsion under § 706(1).[9] Therefore, the failure of an agency to carry out its mandatory, nondiscretionary duty either by an established deadline or within a

[9] Courts have implicitly recognized that unlawfully withheld actions are considered final under § 704. Some emphasize, for example, that an agency must carry out nondiscretionary duties required by law, without discussing whether the withheld duty would be considered a final agency action. *Firebaugh Canal Co. v. United States*, 203 F.3d 568, 577 (9th Cir. 2000); *Forest Guardians*, 174 F.3d at 1187-88 (collecting Tenth Circuit cases explaining that an agency must carry out nondiscretionary duties). Courts have sometimes described § 706(1) as an exception to the APA "finality" requirement. *See, e.g., Independence Mining Co.*, 105 F.3d at 511 (citing *Public Citizen v. Bowen*, 833 F.2d 364, 367 (D.C. Cir. 1987), and *Public Citizen Health Research Group v. Comm'r, FDA*, 740 F.2d 21, 30-32 (D.C. Cir. 1984)). This description may be slightly inaccurate, however, for § 704 of the APA defines the type of agency actions subject to judicial review and, in relevant part, limits judicial review to final agency actions. 5 U.S.C. § 704. Section 706(1), by contrast, defines the "scope" of judicial review over reviewable agency actions. *Id.* § 706; *see also Aladjem v. Cuomo*, No. CIV-A-96-6576, 1997 WL 700511, at *3 n.2 (E.D. Pa. Oct. 30, 1997).

reasonable time period may be considered final agency action, even if the agency might have hypothetically carried out its duty through some "non-final" action.[10]

Accordingly, we reject the BLM's "final, legally binding" argument.

3. *Partial Compliance*

Even if it has a mandatory duty to prevent ORV-induced impairment, the BLM argues that it cannot be compelled to act under § 706(1) because it has taken some partial action to address impairing ORV activity. By and large, the district court rested its jurisdictional ruling on this rationale, reasoning that the BLM could not be compelled to comply with the nonimpairment mandate because the BLM "presented significant evidence about the steps it is and has been taking to prevent [ORV-caused] impairment." We disagree.

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[10] The BLM's argument has other weaknesses. First, it seems somewhat in tension with established precedent holding that an agency may be compelled to make a decision or implement a duty, even if the agency retains discretion over how it will carry out that duty. *See, e.g., Mt. Emmons*, 117 F.3d at 1172; *Marathon Oil*, 937 F.2d at 500; *Yu*, 36 F. Supp. 2d at 931. Second, the BLM's position would seem to create a "no-man's-land" of judicial review, in which a federal agency could flaunt mandatory, nondiscretionary duties simply because it might be able to satisfy these duties through some form of non-final action. Third, in this case, it is clear that many of the steps the BLM might take to address impairment caused by ORV use *would* be considered final agency actions. Indeed, as all parties acknowledge, some of the Recreationists who intervened in this suit have brought a separate lawsuit challenging the BLM's decision to close certain ORV routes in the disputed WSAs. Closing roads, fining unauthorized ORV users, licensing some users but not others, issuing new rules restricting ORV use, etc., possibly could all fall within the definition of a final agency action. *See* 5 U.S.C. § 551(13).

It is undisputed that, at least since the instigation of litigation, the BLM has taken some action, including closing certain roads and posting signs indicating that ORV use is prohibited in certain areas, to address alleged impairment of the WSAs caused by ORV use.[11] However, the mere fact that the BLM has taken some action to address impairment is not sufficient, standing alone, to remove this case from § 706(1) review, as the BLM would have us hold. Indeed, if we were to accept

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[11] For example, on March 21, 2000, the BLM issued regulations closing 19 ORV routes in the Sids Mountain WSA and limiting ORV use to only "four designated routes." The record further indicates that the BLM erected signs and barricades closing ORV routes and sought assistance from local ORV and environmental groups to effectuate restrictions on ORV use.

In the Moquith Mountain WSA, the BLM began combating increased ORV use in 1993 by posting signs, sponsoring educational programs, and increasing limited law enforcement patrols. In 1998, the BLM followed up on these efforts by closing a number of ORV routes. The BLM also indicated that it was planning additional measures where compliance with these measure has not been as successful as hoped.

As to the third WSA area, the Parunuweap WSA, the BLM published a management order in August 2000 limiting ORV use to designated travel routes and prohibiting cross-country ORV travel outside these areas. During testimony before the district court in 2000, the BLM also indicated that it had planned educational programs on ORV use, had ordered signs that would be posted on closed ORV routes in the area, and would be mailing ORV information to interested parties within several weeks, though it is not entirely clear whether the BLM ever implemented these plans.

Finally, between 1990 and 2000, the BLM prohibited ORV travel in the Behind the Rocks WSA, placed information on bulletin boards explaining ORV restrictions, and posted signs and/or dragged objects in front of unauthorized ORV routes. According to testimony in the record, the BLM also monitored ORV activity in the region.

the BLM's argument, we would, in essence, be holding that as long as an agency makes some effort to meet its legal obligations, even if that effort falls short of satisfying the legal requirement, it cannot be compelled to fulfill its mandatory, legal duty. Certainly, the BLM should be credited for the actions it has taken to comply with the nonimpairment mandate; it does not follow, however, that just because the BLM attempts to comply with the nonimpairment mandate, it thereby deprives a court of subject matter jurisdiction to determine whether it has actually fulfilled the statutorily mandated duty and potentially compel action if that duty has not been fulfilled.[12]

In support of its argument, the BLM invokes a few decisions from the Ninth Circuit, suggesting that as long as an agency is taking some action toward fulfilling its legal obligations, courts may not compel compliance under § 706(1). And, indeed, in *Ecology Ctr., Inc. v. United States Forest Serv.*, 192 F.3d 922 (9th Cir. 1999), the Ninth Circuit refused to grant relief under § 706(1) where the "Forest Service merely failed to conduct its duty in strict conformance with [a Forest] Plan and NFMA Regulations."[13] *Id.* at 926.

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[12] Imagine, for example, that applicable federal law prohibited logging in a national forest, yet the BLM only prohibited logging on half the forest, permitting, for one reason or another, logging on the remaining half. The logic of the BLM's argument would have us hold that, because the BLM successfully prevented logging on half, it could not be ordered to prevent logging on the remaining half, notwithstanding the BLM's failure to satisfy its legal obligation to prevent logging in the forest.

[13] The Recreationists also cite to the Fifth Circuit case of *Sierra Club v. Peterson*, 228 F.3d 559 (5th Cir. 2000) (en banc). However, we do not believe that case supports the BLM's position. Rather,

However, with all due respect, we find the Ninth Circuit's analysis on this point unpersuasive. First, in *Ecology Center*, the Ninth Circuit refused to compel the Forest Service to conduct monitoring activities in strict compliance with a forest plan and federal regulations because doing so "would discourage the Forest Service from producing ambitious forest plans." 192 F.3d at 926. Whether requiring a federal agency to comply with its own regulations would discourage that agency from enacting the regulations in the first place, however, is irrelevant for § 706(1) purposes. Our inquiry under § 706(1) is not whether, as a policy matter, particular outcomes would be encouraged or discouraged, but whether the agency has unlawfully withheld or unreasonably delayed a legally required, nondiscretionary duty. *Cf. Forest Guardians*, 174 F.3d at 1187-88 (explaining that § 706(1) requires a court to compel agency action once it has determined that the agency had withheld a legally required duty). Further, the court in *Ecology Center* viewed the monitoring activity as merely precursor data-gathering activity to support later planned final agency action in amending or revising a forest plan. By contrast, here the nonimpairment mandate obligation of the BLM is a discrete obligation having independent significance apart from any further final agency action.

Ecology Center also quoted the D.C. Circuit's decision in *Public Citizen v. Nuclear Regulatory Comm'n*, 845 F.2d 1105 (D.C. Cir. 1988), warning that "[a]lmost

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it essentially held that the plaintiffs' effort to enforce the Forest Service's monitoring obligations was not justiciable. *Id.* at 566-68 & n.11. There is no suggestion in that case that jurisdiction over the monitoring claim failed because of partial monitoring activity by the Forest Service.

any objection to agency action can be dressed up as an agency's failure to act" and cautioning courts against entertaining § 706(1) suits where an agency has taken some action. 845 F.2d at 1108. We find, however, that *Public Citizen* is readily distinguishable. At issue in *Public Citizen* was the Nuclear Regulatory Commission's issuance of nonbinding regulations "for the training and qualifications of nuclear power plant personnel." *Id.* at 1106. A relevant federal statute required the agency to issue binding regulations, and the appellant in that case sued, seeking to compel the agency to issue binding regulations. *Id.* Applicable federal statutes, however, required the appellant to bring suit challenging final agency actions or an alleged failure to act within, at most, 180 days of the agency's decision or inaction, a deadline the appellant clearly missed if measured by the issuance of the nonbinding regulations. *Id.* at 1107. Consequently, the issue directly before the D.C. Circuit was not whether the agency's issuance of nonbinding regulations insulated it from § 706(1) review, but whether the issuance of the nonbinding regulations was sufficient action to start the running of the 180-day statute of limitations period, notwithstanding the nonbinding nature of the regulations. The D.C. Circuit found the nonbinding regulations were "a formal product of the Commission, published in the Federal Register, and expressly stat[ed] [by the agency] that it is responsive to the mandate of the Nuclear Waste Policy Act." *Id.* at 1108. Thus, by the clear statement of the agency itself, the issuance of the nonbinding regulations was intended to be final agency action, which triggered the running of the statute of limitations. The statute of limitations could not be circumvented merely by arguing that the agency's performance was inadequate and thus should be considered

an ongoing failure to act, resulting in an ever-green cause of action for failure to act.

The situation in the case before us is totally different. Here, it is alleged that the BLM is in ongoing violation of a duty to prevent impairment of the WSAs. That is an independent duty, and the BLM is not asserting that it has taken final agency action that should have triggered a statute of limitations barring SUWA's claim. We, therefore, disagree with the notion that *Public Citizen* stands for the proposition that any time an agency takes some steps toward fulfilling a legal obligation, it is insulated from § 706(1) review.

Nevada v. Watkins, 939 F.2d 710 (9th Cir.1991), another Ninth Circuit decision cited by the BLM, also is inapposite. The court there simply held that the issuance of preliminary guidelines for evaluating a nuclear waste disposal site was not a final agency action because Congress, in the Nuclear Waste Policy Act, declared that such conduct should not be deemed final agency action. *Id.* at 714 n.11. Obviously, we have no such clear congressional determination here. Accordingly, we reject the BLM's contention that, because it has taken some steps to address impairment caused by ORV use, it is immune from § 706(1) review.[14]

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[14] This is not to suggest that the agency's attempted compliance is totally irrelevant to § 706(1) proceedings. In *Forest Guardians*, for example, we rejected the argument that budgetary constraints could excuse the Secretary of Interior's "fail[ure] to perform a nondiscretionary duty." 174 F.3d at 1191. Nonetheless, we held that budgetary constraints could be considered when deciding what remedy the court should impose for the alleged violation or whether the Secretary should be held in contempt. *Id.*

D. *Conclusion Regarding FLPMA Claim*

In summary, we find that the BLM has a mandatory, nondiscretionary duty to prevent the impairment of WSAs, and in this case, as the district court acknowledged in its decision, SUWA's complaint presents colorable evidence suggesting that ongoing ORV use has or is impairing the disputed WSAs' wilderness values, possibly in violation of the FLPMA's nonimpairment mandate. The fact that the BLM could, in theory, prevent the allegedly impairing ORV use through means other than a final agency action, and that the BLM is taking some steps to prevent ORV-induced impairment, does not deprive the district court of subject matter jurisdiction under § 706(1) to consider the issue. Therefore, we reverse the district court's conclusion that it lacked subject matter jurisdiction over SUWA's impairment claims. On remand, the district court, giving appropriate deference to the IMP's definition of impairment, must determine whether the BLM has, in fact, failed to comply with the FLPMA's the nonimpairment mandate.

IV. *Duties under the Land Use Plans*

SUWA also alleges on appeal that the BLM failed to carry out a mandatory duty to manage several areas "in accordance with [their] land use plans."

The district court dismissed the SUWA's LUP-based claims on two grounds. The district court reasoned on the one hand that, under relevant regulations, compliance with forest management plans is "limited only to affirmative projects either approved or undertaken after the RMP is in place; [the applicable regulation] does not require that further planning activities contemplated by the plan actually take place." Because

SUWA's complaint did not focus on "some site-specific action," the district court concluded that the BLM could not be compelled under § 706(1) to comply with the "monitoring" and ORV-implementation plans promised in LUPs. Alternatively, the district court explained, SUWA's claims were simply a challenge to "the sufficiency of [the] BLM's actions, rather than a failure to carry out a clear ministerial duty."

On appeal, the BLM urges us to affirm based on the reasons identified by the district court. In addition, the BLM argues that LUPs do not create mandatory, nondiscretionary duties because LUPs "are not Congressional mandates, and they are subject to contingencies, such as availability of funds, personnel and the presence of competing priorities." We find the arguments articulated by the BLM and the district court unpersuasive.

A. *LUPs*

The FLPMA requires the Department of the Interior and the BLM to "manage the public lands . . . in accordance with the land use plans [LUPs] developed . . . under section 1712 [of the FLPMA]." 43 U.S.C. § 1732(a). Section 1712, in turn, identifies a number of criteria and concerns that must be taken into account in developing LUPs. *Id.* § 1712(a), (c); *see also* 43 C.F.R. § 1610.2 (discussing public participation in LUPs).

At issue in this case are the LUPs for lands characterized as the "Factory Butte and San Rafael areas." It is undisputed that in 1990, an LUP identified Factory Butte as a region requiring special monitoring for ORV use, stated that the "[t]he area will be monitored and closed if warranted," and indicated that "[r]esource damage will be documented and recommendations made for corrective action." The BLM acknowledges

that between 1990 and 2000 it did not fully comply with the Factory Butte monitoring pledge. In particular, it failed to maintain a monitoring supervision file specified in the LUP.

In 1991, the BLM created the San Rafael LUP, which called for designation of ORV trails "following completion of an ORV implementation plan," which was scheduled to be completed within one year of the LUP's approval. In turn, the ORV implementation plan was to develop criteria for determining what areas in San Rafael would be open to ORV use. During the course of the litigation, the BLM admitted that it prepared an ORV implementation plan on October 6, 1997, but that it had been only partially implemented.

B. *LUP Claim*

As an initial matter, we reject the BLM's contention that it did not have a mandatory, nondiscretionary duty to carry out the activities described in the disputed LUPs. The Factory Butte and San Rafael LUPs declare that Factory Butte "will be monitored" for ORV use and that an ORV implementation plan for San Rafael "will be developed." The FLPMA, in turn, unequivocally states that "[t]he Secretary shall manage the public lands . . . in accordance with the land use plans developed by him." 43 U.S.C. § 1732(a); *see also Pub. Lands Council v. Babbitt*, 167 F.3d 1287, 1299 (10th Cir. 1999) (noting how the BLM "shall manage" lands in accordance with LUPs); *Natural Res. Def. Council, Inc. v. Hodel*, 618 F.Supp. 848, 858 (E.D. Cal. 1985) (same). Relevant regulations similarly provide that the BLM "will adhere to the terms, conditions, and decisions of officially approved and adopted resource related plans." 43 C.F.R. § 1601.0-5(c). Therefore, a straightforward reading of the relevant LUPs, as well

as applicable statutes and regulations, suggests that the BLM must carry out specific activities promised in LUPs.

It is true, as the BLM and the Recreationists argue, that Congress intended LUPs to be dynamic documents, capable of adjusting to new circumstances and situations. *See* H.R. Rep. No. 94-1163, at 5 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6175, 6179, *quoted in Natural Res. Def. Council, Inc. v. Hodel*, 624 F. Supp. 1045, 1059 (D. Nev. 1985) ("The term 'land use planning' is not defined in [the] bill because it is a term now in general usage and permits a large variety of techniques and procedures and various alternatives."). The BLM can draft LUPs in a way that optimizes the agency's ability to respond to changing circumstances and conditions. However, the BLM cannot "ignore the requirements of the Forest Plan."[15] *Sierra Club v. Martin*, 168

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[15] The BLM invokes the Supreme Court's decision in *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 118 S. Ct. 1665, 140 L. Ed. 2d 921 (1998), to support its claim that courts cannot compel compliance with LUPs under § 706(1) because "agency plans are programmatic planning documents which are subject to continual review and refinement." We find *Ohio Forestry* inapposite. *Ohio Forestry* does not stand for the proposition that the Forest Service cannot be compelled to conform its current conduct to LUPs. Rather, the Court held in *Ohio Forestry* that an environmental interest group's challenge to a forest plan allowing logging within a national forest was not ripe because, before any logging could occur, the Forest Service had to "focus upon a particular site, propose a specific harvesting method, prepare an environmental review, permit the public an opportunity to be heard, and (if challenged) justify the proposal in court." 523 U.S. at 734, 118 S. Ct. 1665. Contrary to the BLM's argument that *Ohio Forestry* held that a forest plan was merely a planning document with no legal effect, the Supreme Court said that "in [the] absence of [Plan authorization] logging could not take place." *Id.* at 730, 118 S. Ct.

F.3d 1, 4 (11th Cir. 1999); *see also Neighbors of Cuddy Mountain v. United States Forest Serv.*, 137 F.3d 1372, 1376-77 (9th Cir.1998) (same); *Ore. Natural Res. Council Action v. United States Forest Serv.*, 59 F. Supp. 2d 1085, 1094-95 (W.D.Wash.1999) (same). Similarly, the BLM's right (in accordance with applicable environmental statutes, such as NEPA) to amend or alter existing LUPs does not free the agency from carrying out present obligations. Just as the BLM can be held accountable for failing to act with regard to its non-impairment duty, it also can be held accountable for failing to act as required by the mandatory duties outlined in an LUP. Therefore, a colorable claim of failing to adhere to LUP duties provides a court with subject matter jurisdiction to consider whether the failure to act warrants relief under § 706(1).

C. *Future Action Argument*

We also find unconvincing the BLM's claims that it is required to comply with the mandates of a LUP only when it undertakes a future, site-specific project. Undeniably, many federal lawsuits involving forest plans arise when a federal agency authorizes a particular action within a forest without complying with specific plan requirements. *See, e.g., Sierra Club v. Martin*, 168 F.3d 1, 3 (11th Cir. 1999); *Utah Envtl.*

1665; *see also* Trent Baker, *Judicial Enforcement of Forest Plans in the Wake of Ohio Forestry*, 21 Pub. Land & Resources. L.Rev. 81, 107 (2000) (explaining that, even after *Ohio Forestry*, "agency decisions to ignore their own regulations are reviewable under the APA as final agency actions or failures to act"). Further, the plan provisions under review in *Ohio Forestry*, unlike the Plan provision being asserted here, do not purport to establish immediate obligations on the Forest Service but only set forth broad preconditions for further action.

Cong. v. Zieroth, 190 F. Supp. 2d 1265, 1268 (D. Utah 2002); *Forest Guardians v. United States Forest Serv.*, 180 F. Supp. 2d 1273, 1277-78 (D.N.M. 2001). Nothing in the FLPMA, however, indicates that the BLM is required to comply with LUPs only when it undertakes some future, site-specific action. Some Plan provisions may only restrict future, site-specific action, *see Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 118 S. Ct. 1665, 140 L. Ed. 2d 921 (1998), while other Plan provisions may restrict the agency's ongoing conduct or impose immediate duties on the agency even in the absence of future, site-specific proposals. As to the latter provisions, such as the ones at issue here, they have by their own terms immediate effect on the BLM. As discussed above, the FLPMA simply and straightforwardly declares, "[t]he Secretary shall manage the public lands . . . in accordance with the land use plans developed by him." 43 U.S.C. § 1732(a); *see also Public Lands Council*, 167 F.3d at 1299 (noting how the BLM "shall manage" lands in accordance with LUPs). It does not suggest that management "in accordance" with LUPs will occur only when some discrete post-plan action occurs, or that the BLM is not obligated to follow through on and carry out specific actions, such as monitoring for ORV use, promised in a LUP. Likewise, some regulations suggest that the BLM must comply the LUP requirements. *See* 43 C.F.R. § 1601.0-5(c) (explaining that the BLM "*will adhere* to the terms, conditions, and decisions of officially approved and adopted resource related plans").

The BLM invokes certain regulatory provisions that state that *future* management actions must conform to approved plans. *See* 43 C.F.R. § 1610.5- 3(a); *see also* 43 C.F.R. § 1601.0-2. However, those regulations do not in

any manner suggest that the BLM is relieved from implementing ongoing actions if they are specifically promised in the LUP itself. The BLM suggests that inaction cannot constitute a violation of a LUP. But the failure to implement a program specifically promised in an LUP carries the same effect as if the agency had taken an "affirmative" or "future" action in direct defiance of its LUP obligations. *Cf. Coalition for Sustainable Res.*, 259 F.3d at 1251; *Thomas*, 828 F.2d at 793. As such, a court may compel the BLM to carry out a duty imposed by an LUP that has been unreasonably delayed or unlawfully withheld.[16] See *Martin*, 168 F.3d at 4.

Accordingly, we reverse the district court to the extent it dismissed SUWA's LUP-based claims on the ground that the BLM's obligation to comply with LUP is only triggered by "some [future] site-specific action taken by the BLM."

D. *Partial Compliance*

For the reasons outlined in our discussion of SUWA's nonimpairment claims, we also reverse the district court's conclusion that the BLM cannot be compelled under § 706(1) to comply with the LUP requirements because, "while the BLM's actions have not been carried out to the letter [of the LUPs], there has not been a complete failure to perform a legally required

[16] The BLM's refusal to adhere to promised monitoring programs, such as those discussed in the Factory Butte LUP, is in tension with regulations mandating that LUPs "establish intervals and standards, as appropriate, for monitoring and evaluation of the plan" and that forest managers "shall be responsible for monitoring and evaluating the plan in accordance with the established intervals and standards." 43 C.F.R. § 1610.4-9.

duty that would trigger review under § 706(1)." As previously explained, partial efforts toward completing a legally required duty do not prevent a court from compelling action under § 706(1). However, when the district court reviews the merits on remand, it can take into account the LUP's mechanism for addressing changing circumstances and conditions in determining the scope of the duties involved and the agency's attempted compliance.[17]

E. *LUP Conclusion*

In summary, we find that the district court improperly dismissed SUWA's LUP-based claims for want of subject matter jurisdiction. Contrary to the suggestions of the district court and the BLM, we hold that the BLM did have a mandatory, nondiscretionary duty to comply with the Factory Butte LUP's ORV-monitoring provision and the San Rafael LUP's ORV-implementation provision. We reject the BLM's arguments that (1) LUPs cannot impose mandatory, nondiscretionary duties and/or (2) can only impose mandatory

[17] On appeal, there has been some suggestion by the parties that SUWA's LUP claims, particularly with regard to the Factory Butte area, are now moot because the BLM implemented the LUP requirements after SUWA instituted the present litigation. On remand, the district court should consider whether some or all of the SUWA's LUP-based claims are moot, though we note that the Supreme Court has cautioned against finding a claim moot where a party ends the challenged, allegedly illegal conduct after the filing of a lawsuit, unless it is "*absolutely* clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 222, 120 S. Ct. 722, 145 L. Ed. 2d 650 (2000) (emphasis in original, internal quotation marks omitted); *see also Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 190, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000) (same).

duties when an affirmative, future, and site-specific action occurs. And, for reasons previously discussed, we reject the suggestion that the BLM's efforts towards compliance with the LUP obligations, delayed for over a decade, preclude § 706(1) review.

V. *NEPA*

The third issue presented on appeal centers around the National Environmental Policy Act (NEPA) and the BLM's alleged failure to take a "hard look" at information suggesting that ORV use has substantially increased since the NEPA studies for the disputed areas were issued. SUWA contends that, under § 706(1), the BLM should be compelled to take a hard look at this information to decide whether a supplemental environmental impact statement (SEIS) or supplemental environmental assessments should be prepared for certain affected areas. In particular, SUWA argues that the BLM's most recent NEPA analyses for the San Rafael Swell, Parunuweap, Behind the Rocks, and Indian Creek areas are dated and do not account adequately for recent increases in ORV activity.[18]

The BLM argues that it should not be compelled to take a hard look at the increased ORV use because it is "planning to conduct NEPA analysis of the nature of impacts of current levels of OHV use in all [the relevant] areas within the next several years," subject to resource constraints. The BLM further argues that

[18] SUWA specifically challenges a 1990 environmental assessment (EA) for the Henry Mountains area, a 1991 EIS for the San Rafael Swell area, a 1980 EA for the Parunuweap area, a 1985 EA for the Behind the Rocks area, and a 1991 EIS for the Indian Creek area.

SUWA failed to raise its "hard look" argument before the district court, instead "resting only on [the] BLM's alleged 'failure to produce supplemental environmental impact statements.'" Significantly, the BLM does not directly dispute on appeal that the alleged ORV use requires a hard look, and it concedes that, "on a nationwide level, it needs to revise many of its land management plans."

In its discussion of SUWA's NEPA claim, the district court initially acknowledged that SUWA was seeking to compel the BLM to take a "hard look" at the ORV information. Yet it then rejected SUWA's hard look claim on the ground that a court could not compel the BLM to prepare supplemental NEPA analyses based on the present record, suggesting in the process that SUWA was seeking to compel the production of a SEIS.

For the reasons discussed below, we believe that the district court misinterpreted SUWA's claim and applied the wrong analysis, and we find that the BLM's arguments for affirming the district court's ruling unconvincing. Consequently, we reverse the district court's decision.

A. *Supplemental Analysis under NEPA*

Under NEPA, "'major Federal actions significantly affecting the quality of the human environment' must be preceded by an environmental impact statement or EIS." *Holy Cross Wilderness Fund v. Madigan*, 960 F.2d 1515, 1521 (10th Cir. 1992) (citation omitted). Before creating an EIS, however, a government agency may prepare a document called an environmental assessment (EA). *Friends of the Bow v. Thompson*, 124 F.3d 1210, 1214 (10th Cir. 1997). If after preparing the

EA, the agency concludes that a proposed action will not significantly affect the environment, the agency may issue a "finding of no significant impact" (FONSI) and "need not prepare a full EIS." *Id.*; *see* 40 C.F.R. § 1501.4(e). The primary goal of NEPA is to make sure a government agency carefully gathers and evaluates relevant information about the potential impact of a proposed agency action on the environment and that this information is made available to the public. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349, 109 S. Ct. 1835, 104 L. Ed. 2d 351 (1989); *see also* 40 C.F.R. § 1500.1(b) ("NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken."). NEPA does not require an agency to reach a particular substantive outcome. *Marsh v. Ore. Natural Res. Council*, 490 U.S. 360, 371, 109 S. Ct. 1851, 104 L. Ed. 2d 377 (1989); *Envtl. Def. Fund, Inc. v. Andrus*, 619 F.2d 1368, 1374 (10th Cir. 1980).

Due to this emphasis on informed decisionmaking, federal regulations require government agencies to prepare an SEIS or a supplemental EA (1) if the agency "makes substantial changes in the proposed action that are relevant to environmental concerns" or (2) "significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts" arise.[19] 40 C.F.R. § 1502.9(c)(i)-(ii); *see also Marsh*, 490 U.S. at 372-73, 109 S. Ct. 1851; *Colo. Envtl. Coalition v. Dombeck*, 185 F.3d 1162, 1177-

[19] The standard for preparing a supplemental EA is the same as for preparing an SEIS. *See Idaho Sporting Cong., Inc. v. Alexander*, 222 F.3d at 566 & n.2 (9th Cir. 2000); *Friends of the Bow*, 124 F.3d at 1218 & n.3.

78 (10th Cir. 1999). As the Supreme Court explained, "It would be incongruous with th[e] approach to environmental protection . . . for the blinders to adverse environmental effects, once unequivocally removed, to be restored prior to the completion of agency action simply because the relevant proposal has received initial approval." *Marsh*, 490 U.S. at 371, 109 S. Ct. 1851.

This court and the Supreme Court have recognized, however, that an agency does not have to supplement an EIS or an EA "every time new information comes to light." *Id.* at 373, 109 S. Ct. 1851; *Friends of the Bow*, 124 F.3d at 1218 (quoting *Marsh*). "To require otherwise," the Supreme Court has observed, "would render agency decisionmaking intractable, always awaiting updated information only to find new information outdated by the time a decision is made." *Marsh*, 490 U.S. at 373, 109 S. Ct. 1851. Instead, "[t]he issue is whether the subsequent information raises new concerns of sufficient gravity such that another, formal in-depth look at the environmental consequences of the proposed action is necessary." *Wisconsin v. Weinberger*, 745 F.2d 412, 418 (7th Cir. 1984); *see also S. Trenton Residents Against 29 v. Fed. Highway Admin.*, 176 F.3d 658, 663-64 (3d Cir. 1999) (same).

In evaluating an agency's decision not to develop a SEIS or supplemental EA, courts utilize a two part test. First, they look to see if the agency took a "'hard look' at the new information to determine whether [supplemental NEPA analysis] is necessary." *Headwaters, Inc. v. Bureau of Land Mgmt., Medford Dist.*, 914 F.2d 1174, 1177 (9th Cir. 1990); *see also Marsh*, 490 U.S. at 374, 109 S. Ct. 1851; *Hughes River Watershed Conservancy v. Johnson*, 165 F.3d 283, 286 (4th Cir.

1999). In applying the hard look test, courts may consider whether the agency "obtains opinions from its own experts, obtains opinions from experts outside the agency, gives careful scientific scrutiny, [ ] responds to all legitimate concerns that are raised," *Hughes River*, 165 F.3d at 288 (citing *Marsh*, 490 U.S. at 378-85, 109 S. Ct. 1851), or otherwise provides a reasoned explanation for the new circumstance's lack of significance. Second, after a court determines that an agency took the requisite "hard look," it reviews an agency's decision not to issue an SEIS or a supplemental EA under the APA's arbitrary and capricious standard. *Marsh*, 490 U.S. at 377, 109 S. Ct. 1851; *Colo. Envtl. Coalition*, 185 F.3d at 1178; *Friends of the Bow*, 124 F.3d at 1218; *Hughes River Watershed Conservancy v. Glickman*, 81 F.3d 437, 443 (4th Cir. 1996).

B. *Hardlook Claim*

Turning to the merits of the parties' arguments, we initially conclude that SUWA properly raised its "hard look" claim before the district court. A review of the district court proceedings indicates that SUWA claimed that the "BLM's failure to take [a] 'hard look' . . . is a clear violation of NEPA's requirements." In advancing this argument, SUWA distinguished the first step of supplemental NEPA review (whether an agency took a hard look at new information) from the second step (whether the agency acted arbitrarily and capriciously in not issuing an SEIS or a supplemental EA) and made clear it was challenging the BLM's failure to take a "hard look," not whether the BLM acted arbitrarily and capriciously in refusing to prepare a supplemental NEPA analysis. While SUWA did include a rhetorical flourish suggesting that "should the agency take the required hard look, the inescapable conclusion of that

analysis must be that the 'new circumstances' . . . require supplemental NEPA," the BLM apparently recognized that SUWA was asserting a "failure to take a 'hard look'" claim and responded accordingly. Consequently, we conclude that SUWA adequately raised and preserved its claim that the BLM should be compelled to take a hard look at new information suggesting "significant new circumstances . . . relevant to environmental concerns and bearing" on its management of the disputed lands. 40 C.F.R. § 1502.9(c)(i)-(ii). Further, we conclude the district court erred by resolving SUWA's claim on the ground that, based on the evidence currently before it, an actual SEIS or supplemental EA could not be ordered.

C. *Future NEPA Action*

We also believe that the BLM is misguided in claiming that because it will be undertaking NEPA analysis in the near future, a court cannot, or, at the very least, should not, require it to take a hard look at the increased ORV use. The BLM's assertion that it hopes to fulfill, or even will fulfill, its NEPA obligations in the future does not address its current failures to act. *Cf. Portland Audubon Soc'y v. Babbitt*, 998 F.2d 705, 709 (9th Cir.1993) ("[W]e are unmoved by the Secretary's claim that it would be futile to prepare supplemental EISs . . . when its new Resources Management Plans and accompanying EISs will address all the relevant information.").

Similarly, the BLM's claim that it should not be compelled to take a hard look at present ORV use because it faces budget constraints and because requiring such a review "would only divert BLM's resources from its current and planned NEPA work" is unavailing. The BLM's budgetary argument wrongly conflates financial

constraints with the legal issue in this case: whether the BLM is required to take a hard look at increased ORV use under NEPA. An agency's lack of resources to carry out its mandatory duties, we have reasoned, does not preclude a court from compelling action under § 706(1). *Forest Guardians*, 174 F.3d at 1189 n.14 (holding that the unavailability of resources cannot be used as a defense against an action to compel an agency to carry out its mandatory, nondiscretionary duties); *see also id.* at 1192 ("Wisely, the Secretary does not press the argument that inadequate congressional appropriations relieved him of his ESA duties. We could not accept that argument if it had been raised. . . ."). Instead, we have explained, an inadequate resource defense must be reserved for any contempt proceedings that might arise if the agency fails to carry out a mandatory duty after being ordered to do so by a court. *Id.* (expressing sympathy for the resources argument and noting that it "could arise at the contempt stage").

Additionally, we find the BLM's claim that it should not be compelled to take a hard look at increased ORV use because it intends to conduct NEPA reviews in the near future problematic in light of its budget-based arguments. The BLM's extensive discussion about the budgetary woes confronting it, as well as its concession that "limited resources will prevent [the] BLM from undertaking all of its desired [NEPA] planning efforts immediately," raise serious questions about the likelihood of a future hard look actually occurring. Our concern on this score is only increased by the BLM's failure to offer a concrete time table for when its NEPA activities will occur; all the BLM suggests is that further NEPA review will occur over the next "several" or "few" years.

Accordingly, we conclude that the district court erred in concluding that it could not order the BLM to take a hard look at the information presented by SUWA. *Cf. Hughes River*, 81 F.3d at 446 (concluding that Agency violated NEPA by not taking a hard look at information before declining to issue a SEIS).

VI. *Conclusion*

In our view, the district court erroneously concluded that because the BLM has taken some steps toward addressing alleged ORV-caused impairment and toward complying with LUP requirements, it lacked subject matter jurisdiction under § 706(1) of the APA. We also find that the district court mistakenly believed that the BLM is only bound by the requirements of LUPs when it undertakes "affirmative, future actions" that conflict with mandatory LUP duties. Finally, we further conclude that the district court misapprehended the nature of SUWA's NEPA claim. The alternative grounds for affirming the district court's ruling offered by the BLM, including its claim that unlawfully withheld action may only be compelled under § 706(1) if the withheld action, once carried out, would be considered final agency action, are unpersuasive. Accordingly, we REVERSE the district court's decision and REMAND for proceedings consistent with this opinion.

McKAY, Circuit Judge, concurring in part and dissenting in part:

While I concur in the result reached by the majority as to Appellants' NEPA claim, I respectfully dissent in all other respects.

I. *Misconstruing the BLM's Nonimpairment Obligation*

The court's failure to follow well-established precedent which mandates that we determine the scope of § 706(1) jurisdiction by a mandamus standard leads to its unwarranted conclusion that any mandatory agency obligation is amenable to attack pursuant to § 706(1) of the APA. Maj. op. at 1224. The majority opinion does not, and cannot, cite a single case from any court justifying this novel proposition.

Our ability to grant injunctive relief under § 706(1) is governed by a standard similar to the one used in evaluating requests for mandamus relief. *See Mount Emmons Mining Co. v. Babbitt*, 117 F.3d 1167, 1170 (10th Cir. 1997); *Independence Mining Co., Inc. v. Babbitt*, 105 F.3d 502, 507 (9th Cir. 1997). "Mandamus relief is an appropriate remedy to compel an administrative agency to act where it has failed to perform a nondiscretionary, *ministerial* duty." *Marathon Oil Co. v. Lujan*, 937 F.2d 498, 500 (10th Cir. 1991) (citations omitted) (emphasis added). In § 706(1) actions, plaintiffs must demonstrate either "agency recalcitrance [ ] in the face of [a] clear statutory duty[, or agency recalcitrance] 'of such a magnitude that it amounts to an abdication of statutory responsibility. . . .'" *ONRC Action v. BLM*, 150 F.3d 1132, 1137 (quoting *Public Citizen Health Research Group v. Comm'r, Food & Drug Admin.*, 740 F.2d 21, 32 (D.C. Cir. 1984)).

I agree with the majority that BLM's FLPMA obligation is both mandatory and continuous. This observation, however, reveals but a portion of Appellees' burden in establishing jurisdiction pursuant to § 706(1). Because we employ a mandamus standard when evaluating § 706(1) jurisdiction, § 706(1) plaintiffs must also

prove that they are challenging a *ministerial* agency obligation. *See Marathon Oil*, 937 F.2d at 500. Ministerial is defined as "an act that a person after ascertaining the existence of a specified state of facts performs in obedience to a mandate of legal authority *without the exercise of personal judgment upon the propriety of the act and usually without discretion in its performance.* . . . ." Webster's Third New Int'l Dictionary (1986) (emphasis added). The BLM's nonimpairment FLPMA obligation is not remotely ministerial.

The majority concedes the well-settled rule that the propriety of jurisdiction pursuant to § 706(1) must be determined in accordance with our mandamus jurisprudence. Maj. op. at 1226, n.6. The majority also concedes that the BLM's nonimpairment obligation is generally stated and involves a substantial amount of discretion in the manner in which the BLM meets its obligation. *Id.* at 1227. Despite conceding the very points that establish the fact that the BLM's FLPMA nonimpairment duty is not ministerial is nature, the majority's opinion nonetheless maintains that Appellants may challenge the BLM's alleged failure to meet its nonimpairment obligation pursuant to § 706(1)'s provisions.[1]

Despite recognizing, as it must, that § 706(1) jurisdiction is properly analyzed under our mandamus jurisprudence, the thrust of the majority's position is

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[1] The requirement that the agency's obligation be ministerial in nature has also been expressed as a requirement that the agency's obligation be "a plainly defined and preemptory duty." *Hadley Mem'l Hosp., Inc. v. Schweiker*, 689 F.2d 905, 912 (10th Cir. 1982) (citations omitted). The BLM's nonimpairment obligation simply cannot be viewed as either ministerial or a plainly defined and preemptory duty.

that any mandatory duty, regardless of how generally stated and regardless of the amount of discretion given to the agency in the performance of its duty, is challengeable pursuant to § 706(1). Additionally, the majority in no way limits its novel interpretation of § 706(1) jurisdiction to the environmental field. Apparently, as set out in the majority opinion, any mandatory obligation of any United States agency could be challenged using § 706(1) as a jurisdictional basis.

The majority's position ignores reality by placing all agency obligations, regardless of the discretion granted to the agency in carrying out the particular obligation, into one category—mandatory obligations. Statutory directives by their nature are mandatory. I have yet to discover a single statute indicating that an agency's obligation is anything other than mandatory. The reality is that the various mandatory obligations given to agencies are properly viewed on a continuum. On one end are agency obligations that are programmatic in nature, i.e., the BLM's nonimpairment duty. The other end of the continuum represents discrete tasks the agency must perform in order to carry out a portion of its overall duties, i.e., processing a mineral application. The latter are properly challengeable pursuant to § 706(1); the former are not.

The majority's position directly contradicts the Supreme Court's mandate that review under the APA is strictly reserved for cases addressing *specific instances* of agency action or inaction rather than programmatic attacks. *See Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 891-94, 110 S. Ct. 3177, 111 L. Ed. 2d 695 (1990). Plaintiffs "cannot seek *wholesale* improvement of [an agency] program by court decree, rather than in the offices of the Department or the halls of Congress,

where programmatic improvements are normally made." *Id.* at 891, 110 S. Ct. 3177 (emphasis in original). In sum, § 706(1) of the APA cannot be used as a jurisdictional vehicle for claims challenging an agency's overall method of administration or for controlling the agency's day-to-day activities.[2]

The problem with the majority's position is revealed through the use of a simple example. The Immigration and Naturalization Service has a mandatory, ongoing, and continuous obligation to "enforce the Immigration and Nationality Act and all other laws relating to the immigration and naturalization of aliens."[3] 8 C.F.R.

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[2] The Supreme Court observed that

> [t]he case-by-case approach . . . require[d] is understandably frustrating to an organization such as respondent, which has as its objective across-the-board protection of our Nation's wildlife. . . . But this is the traditional, and remains the normal, mode of operation of the courts. . . . Assuredly[, it is] not as swift or as immediately far-reaching a corrective process as those interested in systemic improvement would desire. Until confided to us, however, more sweeping actions are for the other branches.

National Wildlife Fed'n, 497 U.S. at 894, 110 S. Ct. 3177. "Courts are not equipped, nor are they the proper body, to resolve the technical issues involved in agency decisionmaking at 'a higher level of generality.'" *Sierra Club v. Peterson*, 228 F.3d 559, 569 (5th Cir. 2000) (citing *National Wildlife Fed'n*, 497 U.S. at 894, 110 S. Ct. 3177). Few, if any, of the BLM's obligations are expressed at a higher level of generality than the BLM's nonimpairment duty pursuant to FLPMA.

[3] There are a host of mandatory, ongoing, continuous agency obligations that are now subject to attack pursuant to the majority's view of § 706(1) jurisdiction. Another example is the Fish and Wildlife Service's obligation to utilize its authority to "seek to conserve endangered species and threatened species." *See* 16 U.S.C. § 1531(c)(1) (2000) (declaring Congress' policy that all federal de-

§ 2.1 (2002). Applying the court's apparent conclusion that any mandatory duty can be challenged pursuant to § 706(1), the failure of the INS to enforce the immigration laws could be properly challenged pursuant to § 706(1). Thus, any individual unhappy with the INS' efforts to prevent the entry of all illegal aliens (despite the laws prohibiting the entry of illegal aliens and the INS' duty to enforce these laws) could bring a lawsuit pursuant to § 706(1) for the INS' "failure to act." Despite our prior case law holding to the contrary, nothing in the majority opinion would constrain the granting of a writ of mandamus ordering the INS to enforce the immigration laws. *See, e.g., Smith v. Plati*, 258 F.3d 1167, 1179 (10th Cir. 2001) (mandamus "not ordinarily granted to compel police officers to enforce the criminal laws") (quotation omitted). The majority's novel interpretation of § 706(1)'s jurisdictional scope permits exactly this incongruous result.

This expanded view of § 706(1) jurisdiction becomes even more apparent when considering the potential

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partments and agencies have an obligation to protect endangered species). The majority offers no explanation to differentiate the mandatory, ongoing, and continuous nature of such agency obligations from the BLM's nonimpairment obligation established by FLPMA. Thus, the majority's view of § 706(1) exposes agencies to attack by plaintiffs who believe that the INS is not properly enforcing all of the immigration laws or that the Fish and Wildlife Service is not sufficiently utilizing its authority to seek and conserve endangered species. Rather than preserve our WSAs (or ensure the INS enforces all of the immigration laws or that the Fish and Wildlife Service utilizes its authority to conserve endangered species) the majority's view of § 706(1) jurisdiction improperly permits plaintiffs unsatisfied with the day-to-day operations of various government agencies to attempt to control these operations through litigation.

remedies available to plaintiffs challenging any mandatory agency obligation. Our prior cases reveal that when we grant a writ of mandamus, the remedy provided within the writ guarantees correction of the error petitioner claimed in the first instance. The writ's ability to correct the problem complained of necessarily requires that the duty challenged be ministerial in nature. *See, e.g., Hulsey v. West*, 966 F.2d 579, 582-83 (10th Cir. 1992) (mandamus granted ordering the district court to ensure petitioner's right to jury trial); *McNeil v. Guthrie*, 945 F.2d 1163, 1168 (10th Cir. 1991) (mandamus granted requiring district court clerk to file pro se papers in class action suit); *Journal Publ'g. Co. v. Mechem*, 801 F.2d 1233, 1237 (10th Cir. 1986) (mandamus writ issued ordering district court to dissolve previous order regarding press contact with jury pool that was over broad); *Hustler Magazine, Inc. v. United States Dist. Court*, 790 F.2d 69, 71 (10th Cir. 1986) (mandamus writ issued requiring district court to conduct a "full and adequate hearing" regarding motion to change venue); *Herrera v. Payne*, 673 F.2d 307, 308 (10th Cir. 1982) (mandamus writ issued compelling district court to attach statement of reasons in order denying a certificate of probable cause as required by Fed. R. App. P. 22(b)).

A similar result occurs when a remedy is granted in a suit brought against agencies for a failure to act pursuant to § 706(1). *See, e.g., Forest Guardians v. Babbitt*, 174 F.3d 1178, 1192 (10th Cir. 1999) (compelling agency to designate a critical habitat for the silvery minnow); *Yu v. Brown*, 36 F. Supp. 2d 922, 931 (D.N.M. 1999) (compelling INS to process plaintiff's application for special immigrant juvenile status). On remand, I can think of no remedy the district court could construct

that would guarantee a correction of the agency failure alleged in the first instance—BLM's full compliance with its nonimpairment duty. At most and at worst, the remedy granted would involve the district court in the ongoing review of every management decision allegedly threatening achievement of the nonimpairment mandate. Quite simply, even if ORV use was entirely banned inside WSAs, the BLM's compliance with such a remedy still would not guarantee that the WSAs would not be impaired in the future.

The majority's opinion essentially transforms § 706(1) into an improper and powerful jurisdictional vehicle to make programmatic attacks on day-to-day agency operations. The Supreme Court has specifically rejected this approach. *See National Wildlife Fed'n*, 497 U.S. at 894, 110 S. Ct. 3177 (APA improper method of making programmatic attacks on agency obligations).

II. *Unwarranted Expansion of "Failure to Act"*

In addition to an unwarranted expansion of § 706(1) threshold jurisdiction, the majority opinion compounds its error by improperly expanding the definition of § 706(1)'s failure to act requirement to include not only true agency inaction but also all agency action which falls short of completely achieving the agency's obligations. This unique interpretation of "failure to act" incorrectly conflates the concepts of action and achievement. Once again, I do not dispute that the BLM must comply with its nonimpairment mandate and must manage WSAs in a manner that prevents impairment. For § 706(1) jurisdictional purposes, however, this is not the issue. Instead, the issue is whether Appellants may use § 706(1) to challenge an agency's failure to completely comply with its obligations as a "failure to

act." The facts in this case do not support such a conclusion.

Because nearly every objection to agency action could be cleverly pleaded as agency inaction, § 706(1) jurisdiction exists "only when there has been a genuine *failure* to act." *Ecology Ctr., Inc. v. United States Forest Serv.*, 192 F.3d 922, 926 (9th Cir. 1999); *see also Public Citizen v. Nuclear Regulatory Comm'n*, 845 F.2d 1105, 1108 (D.C. Cir. 1988) (emphasis added). Complaints about the sufficiency of agency action disguised as failure to act claims are not cognizable pursuant to § 706(1). *See Sierra Club v. Peterson*, 228 F.3d 559, 568 (5th Cir. 2000); *Ecology Ctr.*, 192 F.3d at 926; *Nevada v. Watkins*, 939 F.2d 710, 714 n.11 (9th Cir. 1991).

The majority's summation of Appellants' claims reveals the true nature of Appellants' complaint—insufficiency of agency action disguised as a failure to act claim. Appellants assert that the BLM is "not properly managing off-road vehicle and/or off-highway (collectively ORV) use on federal lands that had been classified by the BLM as Wilderness Study Areas." Maj. op. at 1227. Appellants' objections are not based upon a true failure to act; instead, they address an alleged failure of the BLM to achieve complete success in its efforts to comply with the BLM's nonimpairment obligation.[4] Section 706(1) is unquestionably an inappropri-

[4] The example in footnote twelve of the majority opinion has no application to this case. It assumes that the BLM is either acting in bad faith or taking final agency action inconsistent with its statutory mandate. I agree that bad faith attempts to comply with an agency's obligations is equivalent to no action at all. However, in the present case no one alleges that the BLM is acting in bad faith.

ate jurisdictional basis for such claims. *See, e.g., Sierra Club*, 228 F.3d at 568; *Ecology Ctr.*, 192 F.3d at 926; *Watkins*, 939 F.2d at 714.

The majority's assertion that an "agency's attempted compliance is[n't] totally irrelevant to § 706(1) proceedings" misses the mark completely. Maj. op. at 1232, n.14. Not only is an agency's attempted compliance "not totally irrelevant," it is *the essential* inquiry in determining whether § 706(1) jurisdiction can be properly invoked. I reiterate that § 706(1) jurisdiction is proper *only* when a plaintiff alleges a true failure to act. *Sierra Club*, 228 F.3d at 568; *Ecology Ctr.*, 192 F.3d at 926. The majority maintains that any action taken by an agency that does not result in complete success in the carrying out of mandatory obligations is properly challengeable as a *failure* to act. The burden properly placed on § 706(1) plaintiffs is much more rigorous than that. Plaintiffs must prove a failure of an agency to take *any* action reasonably calculated to achieve the ends of its mandate. It is unrealistic to expect that every agency action taken in good faith will be completely successful. It is even wider of the mark to label good faith agency efforts that fall short of complete success as "failures to act."

In order to log on BLM lands, permits are required. Assuming that the land had been set aside for activities other than logging (as the majority does), granting a logging permit would represent a final agency action properly challengeable pursuant to the APA as a final agency decision. *See* 5 U.S.C. § 704 (1996). Section 704, not § 706(1), would provide the proper jurisdictional basis for such a challenge.

III. *Creating a New Agency Obligation*

The court's improper disposition of Appellants' land use plan claim is due in part to its erroneous view of the scope of § 706(1) jurisdiction and in part to its creation of a new agency obligation that before today the BLM did not possess. Statutorily, BLM's obligation is to manage its lands "in accordance with the land use plans." 43 U.S.C. § 1732(a) (1986). Additionally, 43 C.F.R. § 1610.5-3(a) (2001) states that "[a]ll future resource management authorizations and actions . . . and subsequent more detailed or specific planning[ ] shall conform to the approved plan."

The court asserts that once the BLM develops a land use plan it is required to achieve every single aspect of that plan. It accepts Appellants' argument that allowing the BLM to ignore the affirmative management provisions in its own plans will "make a charade of the BLM land planning, public participation, and NEPA processes." Aplt. Br. at 43. The effect of the majority's opinion is that any failure (regardless of how small) to live up to every aspiration expressed in the BLM's land management plans would entitle Appellants to challenge such failure pursuant to § 706(1).

Correctly viewed, however, the BLM's land plans are aspirational. While the BLM is prevented from approving or undertaking affirmative projects inconsistent with its land use plans, the BLM is not required to meet each and every specific goal set forth in its land use plans or face potential litigation jurisdictionally based on § 706(1) for failing to act. Affirmative projects or final agency decisions inconsistent with land use plans are properly challenged as final agency actions, not as failures to act. Importantly, successful challenges to land use plans have only involved *final* agency

decisions made pursuant to existing land use plans. *See, e.g., Neighbors of Cuddy Mountain v. United States Forest Serv.*, 137 F.3d 1372, 1376, 1382 (9th Cir. 1998) (remanding approval of a timber sale not in conformity with forest plan); *Oregon Natural Res. Council Action v. United States Forest Serv.*, 59 F. Supp. 2d 1085, 1097 (W.D. Wa. 1999) (enjoining timber sale approved before completion of wildlife survey as required by the management plan). I was unable to locate a single case supporting the majority's view.

The court's position is belied by the stated purpose of resource management planning, which is to provide "a process for the development, approval, maintenance, *amendment and revision* of resource management plans." 43 C.F.R. § 1601.0-1 (2001) (emphasis added). Thus, the regulations envision plans that are dynamic, flexible, and that properly balance the competing objectives of the various groups interested in public lands. Requiring an agency to meet every one of its original aspirational objectives denies the intended nature of resource planning. Inherent in the process is the understanding that even well-intended objectives may prove unfruitful in obtaining desired results. Necessarily, a change in approach will be warranted on occasion. Permitting plaintiffs to challenge a land use plan under the guise of a failure to act because each and every objective of the land use plan has not been met would allow plaintiffs of all varieties to substantially impede an agency's day-to-day operations. The Supreme Court has specifically rejected this notion. *National Wildlife Fed'n*, 497 U.S. at 894, 110 S. Ct. 3177 (courts are not the correct place to make programmatic attacks on agencies).

The district court concluded that the BLM's obligation on its face is "limited only to affirmative projects either approved or undertaken after the [Resource Management Plan] is in place; it does not require that further planning activities contemplated by the plan actually take place." Aplt. App. at 865. I agree. The regulations specifically grant a right to challenge an agency decision or amendment that violates a plan's provision. "Any person adversely affected by a specific action *being proposed to implement* some portion of a resource management plan or amendment may appeal such action pursuant to 43 CFR 4.400 at the time the action is proposed for implementation." 43 C.F.R. § 1610.5-3(b) (2001) (emphasis added). The regulations tellingly contain no reference of any kind to the rights of an individual to challenge an agency's failure to meet each and every goal set forth in its land use plans.

I have found absolutely no legal support for the proposition that failure to attain all of the goals of a land use plan can properly be challenged pursuant to § 706(1), nor does the majority opinion cite any. It seems odd to me that, if a plaintiff could properly challenge an agency's failure to reach all of its objectives in its land use plans pursuant to § 706(1), not a single plaintiff has ever prevailed in any court on such a theory. Today the court permits Appellants to potentially proceed on a land management plan claim based upon a previously nonexistent agency obligation.

IV. *Consequences of the Majority's Approach*

The unwarranted and unsupported decision to judicially expand § 706(1) jurisdiction in a way never envisioned by any other court or Congress and the creation of a previously unrecognized agency obligation might be more palatable if the end result of the

endeavor promised significant public policy benefits. Unfortunately, I am convinced that the opposite is true. Instead of assisting agencies in the laudable goal of preserving our nation's precious environmental resources, the effect of the court's decision will likely make the successful protection of our environment even more difficult.

Perhaps the most obvious consequence of this expansion of § 706(1)'s scope is the future syphoning of scarce BLM (and other agencies') resources intended to meet its worthy objectives and obligations to fund increasing unmerited litigation. However narrowly intended, the court's opinion has opened the floodgates of litigation for plaintiffs to challenge any mandatory agency obligation regardless of the amount of discretion afforded to the agency in carrying out its obligations.

Additionally, today's decision turns the burden of proving jurisdiction on its head. It is well accepted that the burden of proving jurisdiction is properly placed on the party invoking jurisdiction (plaintiffs). *See, e.g., Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 104, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998) (citation omitted). Instead, today's decision requires agency defendants to now prove not only that they have acted but also that their actions have been completely successful, rather than properly placing the burden on plaintiffs to prove an agency's true failure to act.

The additional problem with the court's unique view of § 706(1)'s jurisdictional scope is that it is not amenable to reasonable judicial standards. For example, there is no standard as to the proper time when a plaintiff may challenge an agency's failure to comply one hundred percent with a statutory obligation. If an agency's obligation is viewed as mandatory, continuous,

and immediate, nothing here prevents a plaintiff from challenging an agency's failure to successfully and completely comply with its statutory obligation the very next day. This unmanageable approach to § 706(1) jurisdiction shifts to the court what amounts to day-to-day supervision of the level of goal achievement under any agency's plan.

In addition to encouraging increasing amounts of unmerited litigation, the logical consequence of this greatly expanded jurisdiction is the creation of ineffective and passive land use plans. If an agency can be forced into litigation for any failure to completely achieve the goals it sets for itself in its desire to *reach or exceed* its statutory obligation, the agency's likely reaction will be to adopt land use plans that are little more than ambiguous and general restatements of the agency's obligations in the first instance. Such a result would severely constrain an agency's ability to use its expertise and discretion to protect the environment and would hinder the aggressive and successful management of the WSAs that all parties desire.

In sum, I am of the view that the court today has embraced three novel concepts: 1) the BLM's nonimpairment obligation is a ministerial duty subject to attack pursuant to § 706(1); 2) any failure of the BLM (no matter how slight) may provide jurisdiction for a "failure to act" challenge pursuant to § 706(1); and 3) the BLM's (and other agencies') failure to achieve each and every aspiration of its land use plans with completely successful results opens it to potential litigation for "failing to act."

IV. *Conclusion*

Because I view the BLM's nonimpairment obligation pursuant to FLPMA as nonministerial in nature and since only ministerial agency duties are properly subject to attack pursuant to § 706(1)'s provisions, I would affirm the district court's decision to dismiss this claim for lack of jurisdiction. *See Marathon Oil*, 937 F.2d at 500. I would also affirm the district court's decision to dismiss Appellants' land use plan claim because that claim is based on a non-existent duty. The BLM simply is not required to achieve each and every goal of its aspirational land use plans or have that failure, however slight, be challenged pursuant to § 706(1).

Appellants are not without remedy; but, on the facts of this case, Congress has limited the remedy to that provided by § 706(1). Thus, I do concur with the result the majority reaches in remanding Appellants' NEPA claim to determine whether the BLM has truly failed "to take a 'hard look' at information suggesting that ORV use has substantially increased since the NEPA studies for the disputed areas were issued." Maj. op. at 1237.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH CENTRAL DIVISION

No. 2:99CV852K

SOUTHERN UTAH WILDERNESS ALLIANCE, ET AL. PLAINTIFFS

v.

BRUCE BABBITT ET AL., DEFENDANTS
AND
UTAH SHARED ACCESS ALLIANCE, ET AL., DEFENDANT-INTERVENORS
AND
SAN JUAN COUNTY, UTAH, ET AL. DEFENDANT-INTERVENORS

Dec. 22, 2000

MEMORANDUM DECISION AND ORDER

KIMBALL, J.

This matter is before the court on numerous motions: (1) Plaintiffs Southern Utah Wilderness Alliance, the Wilderness Society, the Sierra Club, the Great Old Broads for Wilderness, Wildlands CPR, Utah Council of Trout Unlimited, Americans Lands Alliance, and the Friends of the Abajos' ("Plaintiffs") Motion for a Preliminary Injunction; (2) Plaintiffs' Motion for Dismissal of Plaintiffs' Ninth Cause of Action; (3) Defendants Bruce Babbitt, Tom Fry and the Bureau of Land Man-

agement's ("BLM") Motion to Dismiss Plaintiffs' Ninth Cause of Action with Prejudice; (4) Defendant-Intervenors Utah Shared Access Alliance, Blue Ribbon Coalition, Elite Motorcycle Tours, and Anthony Chatterley's ("Recreationists") Motion to Dismiss. An evidentiary hearing on Plaintiffs' Motion for a Preliminary Injunction was held on August 28, 2000 through August 31, 2000. At that hearing, Plaintiffs were represented by Heidi J. McIntosh, Stephen H.M. Bloch, and Robert B. Wiygul. BLM was represented by Stephen Roth and Jeffrey E. Nelson. Recreationists were represented by Paul A. Turcke. Defendant-Intervenors State of Utah, Emery County, Grand County, Kane County, San Juan County, and Wayne County (the "State") was represented by Stephen G. Boyden, Stephen H. Urquhart, and David Blackwell. The State of Utah Institutional Trust Lands ("SITLA") was represented by John W. Andrews. A hearing on the Recreationists' Motion to Dismiss and on Plaintiffs' supplemental NEPA claim was held on December 13, 2000. At that hearing, Plaintiffs were represented by James S. Angell and Stephen H.M. Bloch. BLM was represented by Stephen Roth, Recreationists were represented by Paul A. Turcke, and the State was represented by Stephen G. Boyden.

Before both hearings, the court considered carefully the memoranda and other materials submitted by the parties. Since taking the matter under advisement, the court has further considered the law and facts relating to this motion, the testimony of the witnesses presented at the preliminary injunction hearing and the prior hearing on Plaintiffs' motion for a temporary restraining order, and the arguments presented by

counsel. Now being fully advised, the court renders the following Memorandum Decision and Order.

I. BACKGROUND

Plaintiffs have moved the court for a preliminary injunction to prevent the alleged "substantial off-road vehicle ("ORV") damage and impairment to" BLM lands. Plaintiffs contend that BLM is required by federal law to ensure that ORVs do not impair WSAs and to permit ORV use only where the BLM has ensured that it has minimized both environmental impacts and impacts to visitors who do not use ORVs. However, Plaintiffs claim that BLM has failed to perform its statutory and regulatory duties.

The court is faced with the antithetical views of Plaintiffs, on one hand, arguing that they are entitled to the extraordinary relief of a preliminary injunction based on the BLM's alleged failure to carry out its mandatory duties, and Recreationists on the other hand, contending that, not only should the court decline to issue an injunction, but it should go so far as to dismiss Plaintiffs' claims as they pertain to the areas that are the subject of the preliminary injunction motion. Their motion is based on their claim that Plaintiffs have failed to demonstrate that this court has jurisdiction under 5 U.S.C. § 706(1). BLM argues that an injunction should not issue, based on the same jurisdictional argument made by Recreationists, but BLM has declined to join in Recreationists' motion to dismiss Plaintiffs' claims.

Because this court agrees that Plaintiffs have not satisfied their heavy jurisdictional burden in this case and that the claims at issue should be dismissed, Plaintiffs' motion for injunctive relief is moot. Thus, the

court will address the parties' claims and arguments in the context of Recreationists' motion to dismiss.

II. RECREATIONISTS' MOTION TO DISMISS

Recreationists argue that Plaintiffs' claims should be dismissed for lack of subject matter jurisdiction under FRCP 12(b)(1). They claim that Plaintiffs' First, Fifth, Sixth, Seventh,[1] and Ninth Causes of Action, at least as they pertain to the areas at issue in the preliminary injunction motion, must be dismissed. Plaintiffs, as the party invoking federal jurisdiction, bear the burden of proving jurisdictional elements. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). Given the factual record before the court, this motion is not limited to a facial challenge to the sufficiency of the Complaint. A Rule 12(b)(1) motion can challenge the substance of a complaint's jurisdictional allegations in spite of its formal sufficiency by relying on affidavits or any other evidence properly before the court. *New Mexicans for Bill Richardson v. Gonzales*, 64 F.3d 1495, 1499 (10th Cir. 1995). It then becomes necessary for the party opposing the motion to present affidavit or other evidence necessary to satisfy its burden of establishing that the court has jurisdiction. *Id.* The court is then permitted to consider and weigh the sufficiency of these materials in the context of a Rule 12 motion:

[1] Recreationists did not formally move on the Seventh Cause of Action because it was not clear, at the time the motion to dismiss was filed, that the Seventh Cause of Action was going to be relied upon as a basis for injunctive relief. However, Recreationists discussed why the Seventh Cause of Action should be dismissed in its final memorandum, and in arguing for injunctive relief and against dismissal, Plaintiffs have addressed this issue. Thus, the court will consider the merits of the Seventh Cause of Action.

> When, as here, a party attacks the factual basis for subject matter jurisdiction, the court may not presume the truthfulness of the factual allegations in the complaint, but may consider evidence to resolve disputed jurisdictional facts. Reference to evidence outside the pleadings does not convert the motion to dismiss into a motion for summary judgment in such circumstances.

SK Finance SA v. La Plata County, 126 F.3d 1272, 1275 (10th Cir. 1997) (citations omitted).

Judicial review of agency activities is typically limited to "final agency action for which there is no other adequate remedy in a court. . . ." 5 U.S.C. § 704. Plaintiffs' claims are all brought under section 706(1) of the Administrative Procedure Act, which permits a court to compel agency action unlawfully withheld or unreasonably delayed. This type of failure-to-act claim is a very narrow exception to the APA's limitation of judicial review of final agency action. The exception has been narrowly construed to prevent judicial intrusion into the day-to-day workings of agencies. This type of injunctive relief sought by Plaintiffs is essentially the equivalent of mandamus. *Mt. Emmons Mining Co. v. Babbitt*, 117 F.3d 1167, 1170 (10th Cir. 1997); *R.T. Vanderbilt Co. v. Babbitt*, 113 F.3d 1061, 1065 (9th Cir. 1997). Mandamus relief is proper "only where the functions constitute clearly defined, peremptory ministerial duties of a government official owed to a complainant." *Ortiz v. United States*, 661 F.2d 826, 831 (10th Cir. 1981). Mandamus is an appropriate remedy only if the plaintiff is owed a "clear nondiscretionary duty." *Marquez-Ramos v. Reno*, 69 F.3d 477, 478-79 (10th Cir.1995) (stating that "[t]he importance of the term 'nondiscretionary' cannot be overstated—the judi-

ciary cannot infringe on decision-making left to the Executive branch's prerogative."). Claims that agency action is insufficient or inadequate do not fall within the scope of permissible judicial review under APA § 706(1).

Indeed, in assessing whether agency action is unreasonably delayed[2] and thus reviewable under 706(1), "courts have permitted jurisdiction under the limited exception to the finality doctrine [provided by 5 U.S.C. 706(1)] only where there is a genuine failure to act." *Ecology Center, Inc. v. United States Forest Serv.*, 192 F.3d 922, 926 (9th Cir. 1999). Thus, Plaintiffs cannot "evade the finality requirement with complaints about the sufficiency of agency action dressed up as an agency's failure to act." *Id.* (quotations and citations omitted). A justiciable "failure to act" claim requires "agency recalcitrance . . . in the face of a clear statutory duty or . . . of such a magnitude that it amounts to an abdication of statutory responsibility . . ." *ONRC Action v. BLM*, 150 F.3d 1132, 1137 (9th Cir. 1998).

Judicial deference to agency discretion is particularly appropriate when decisions are based on the agency's special expertise and professional judgment, and "[w]hen specialists express conflicting views, an agency

[2] The Tenth Circuit has stated that, under section 706(1), "the distinction between agency action 'unlawfully withheld' and 'unreasonably delayed' turns on whether Congress imposed a date-certain deadline on agency action." *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1190 (10th Cir.1999). In the instant case, there are no "date-certain deadlines" by which BLM's ORV management must operate. Thus, Plaintiffs' claims represent a 706(1) challenge of "unreasonably delayed" agency action, although the court's conclusion in this case would remain the same under either label.

must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive." *Marsh v. Oregon Natural Resources Council, Inc.*, 490 U.S. 360, 378 (1989). Similarly, in matters involving "primarily issues of fact," the analysis of which "requires a high level of technical expertise," courts are to defer to "the informed discretion of the responsible federal agencies." *Id.* at 376-77 (citations and quotations omitted).

A. WILDERNESS STUDY AREAS

Plaintiffs argue that the BLM has violated Section 603 of the Federal Land Policy Management Act ("FLPMA"), 43 U.S.C. § 1782(c), by permitting ORVs to impair the wilderness qualities of the following wilderness study areas ("WSAs"): Parunuweap WSA, Moquith Mountain WSA, Behind the Rocks WSA, and Sids Mountain WSA. They also argue that BLM has violated 43 C.F.R. § 1610.5-3 by failing to consistently implement the terms of its land use management plans regarding existing WSAs and the Factory Butte Special Monitoring Area. Finally, they argue that BLM has failed to comply with the Executive Orders and regulations governing the management of ORVs on BLM lands by permitting ORV use on broad tracts of BLM lands without an application of the minimization criteria contained in these documents.

Plaintiffs argue that they are likely to succeed on the merits and point to the fact that, since they filed this lawsuit, the BLM has voluntarily closed some WSAs initially considered by Plaintiffs in this preliminary injunction request. Plaintiffs presented evidence from Dr. Howard Wilshire, an expert on the impacts of ORVs on desert ecosystems, on the significant resource

damage, including soil erosion and compaction, and destruction of vegetation.

BLM and Recreationists, on the other hand, argue that the court lacks jurisdiction over Plaintiffs' claims.[3] They claim that Plaintiffs' claims are not failure to act claims, but rather, claims about the sufficiency of the BLM's actions.

1. FLPMA's Non-Impairment Standard

FLPMA established a fifteen year review process, beginning in 1976, for the BLM to review and recommend lands for wilderness designation. *See* 43 U.S.C. § 1782(a). In 1980, the BLM identified approximately 2.5 million acres of its lands in Utah as wilderness study areas. *Utah v. Babbitt*, 137 F.3d 1193, 1198 (10th Cir. 1998). In 1991, the Secretary of Interior recommended that approximately 1.9 million acres of those lands become designated wilderness, and President Bush forwarded that recommendation to Congress. *Id.* at 1199. Congress, however, has not acted on BLM's recommendation, and thus the 3.2 million acres of WSAs remain under consideration for entry into the National Wilderness Preservation System, and are managed pursuant to Section 603(c) of FLPMA, 43 U.S.C. § 1782(c).

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[3] Although the BLM has consistently argued that Plaintiffs' claims are really complaints about the sufficiency of the agency action dressed up as an agency's failure to act, and as such, are not justiciable under APA § 706(1), it did not join in Recreationists' motion to dismiss. The BLM's arguments are taken from its briefs opposing Plaintiffs' motion for a preliminary injunction and Plaintiffs' post-hearing briefing. The court has focused on BLM's arguments but notes that Recreationists' arguments are substantially the same.

Congress has provided a standard for management of WSAs:

> During the period of review of such areas [WSAs] and until Congress has determined otherwise, the Secretary shall continue to manage such lands according to his authority under this Act and other applicable law in a manner so as not to impair the suitability of such area for preservation as wilderness.

43 U.S.C. § 1782(c). To implement the nonimpairment standard, the BLM promulgated the Interim Management Policy and Guidelines for Lands Under Wilderness Review, known as the "IMP." (The most current version of the IMP is included in Plaintiffs' Exhibit Vol. I, at Tab 8.) The BLM contends that, while it is under a mandatory statutory duty to manage lands "in a manner so as not to impair the suitability of such acres for preservation as wilderness," what this means and how it is to be carried out is far from clear, as demonstrated by BLM's subsequent development of a 49-page IMP to interpret the meaning of Congress' mandate. IMP at 3 ("To determine what is permissible under the general 'nonimpairment' standard, we must examine what Congress meant by *impairment* of an area's *suitability for preservation of wilderness.*").

Under the IMP, the BLM has a responsibility to ensure that "the existing wilderness values of *all* WSAs . . . are not degraded so far, compared with the area's values for other purposes, as to significantly constrain the Congress' prerogative to either designate a WSA as wilderness or release it for other uses." IMP at 4. Under the IMP, motor vehicle travel "may only be allowed on existing ways and within 'open' areas that

were designated prior to the passage of FLPMA . . ." *Id.* at 15-16. Open areas can also be designated in sand dunes. *Id.* at 47. Other than in permitted open areas, however, "cross-country vehicle use off boundary roads and existing ways" is prohibited. *Id.*

While the IMP's policy is to "take all actions necessary to ensure full compliance with the IMP," *id.* at 8, it also recognizes the reality that unauthorized incursions in the WSAs cannot always be prevented. For example, the agency is to make "every effort . . . to obtain voluntary compliance," but also to take "additional appropriate action" in the event voluntary efforts fail." *Id.* at 8. The IMP's policy is that BLM state directors "assure a level of monitoring and surveillance of each WSA adequate to prevent, detect, and mitigate unauthorized activities" and "attempt to immediately reclaim the impacts caused by any authorized action. . . ." *Id.* Responsible recreational use of WSAs is to be encouraged through promotion of "Leave no Trace" and "Treat Lightly" programs. *Id.* at 45. Allowable recreational uses are also to be monitored to ensure that impairment of "wilderness suitability" does not occur (e.g., from "erosion caused by increased vehicle travel within a WSA"); "if necessary" to prevent such impairment, the BLM will "adjust the time, location, or quantity of use or prohibit that use in the impacted area." *Id.* What the IMP demonstrates is that, while there is a "nonimpairment" mandate, there are management options and levels of response that can be taken to deal with impairment problems, and the choice of response that should be made if impairment occurs is not "clear and certain . . . ministerial and so plainly prescribed as to be free from doubt."

The BLM points out that it is well aware that ORV-caused damage is resulting from cross-country travel in these WSAs, but argues that it does not "permit" such travel, and it is addressing the complicated issue of controlling the problems posed by ORV use. It also argues that "closure" of existing ways is neither required by the IMP, nor is it necessarily the solution to the existing problems. In sum, the BLM argues that Plaintiffs are not asserting a genuine failure-to-act claim, but complaints about the sufficiency of the agency action.

After listening to the testimony during a two-day hearing on Plaintiffs' motion for a temporary restraining order and during a four-day preliminary injunction hearing, and carefully reviewing the briefs filed by the parties, along with the affidavits and other exhibits, the court concludes that Plaintiffs have not demonstrated that BLM has abdicated its statutory responsibility. Plaintiffs' claim appears to be a complaint about the sufficiency of BLM's action, rather than a genuine failure to act. While Plaintiffs have presented significant evidence about the alleged impairment that is occurring in the WSAs due to ORV use, BLM has also presented significant evidence about the steps it is and has been taking to prevent such impairment.

It is clear that the decision to close or leave open an existing way in a WSA is far from clear and certain, ministerial, and so plainly prescribed as to be free from doubt. Whether or not "impairment" is occurring constitutes precisely the type of administrative determination that is entitled to considerable weight. *See ONRC Action*, 150 F.3d at 1139. It is also clear that BLM is aware of the impairment caused by ORV use, and it is, at least, attempting to perform a complex balancing of

many factors that bear on this issue. For example, BLM faces constraints on personnel and other resources, and it must consider the size and number of WSAs and other areas that must be managed, the increasing recreational pressure from ORV users, the assertion of RS 2477 rights by the state and counties, the practicality, feasibility, and effectiveness of various restrictions, and other factors. The representatives from various BLM Field Offices testified about the management efforts in their respective areas, and some discussed efforts at coordinating and collaborating with the state, counties, and local ORV user groups to gain support for cooperation and volunteer actions that would protect WSA values and develop user ethics that respect the land, natural resource and wilderness values. In addition, the BLM must consider that a closure of such routes could result in a backlash by some users who would purposely violate the closure and might significantly reduce or eliminate opportunities for cooperative volunteer projects such as rehabilitation, signing, barricading, and monitoring. These are risks that must be considered, by those with expertise and professional judgment, in arriving at the most effective solution to the problems.

Even if the court were to agree with Plaintiffs that the pace and nature of BLM's actions were inadequate, Plaintiffs still would not have satisfied their onerous burden of demonstrating that the BLM has failed to act. It appears that BLM has taken various actions, many of them recently—perhaps due, at least in part, to this lawsuit—but, steps have been taken nonetheless. Even Plaintiffs stated during their closing arguments, that the BLM has taken "half steps." Thus, this claim must be dismissed.

2. Land Use Management Plans

Under 43 C.F.R. § 1610.5-3(a), "[a]ll future management authorizations and actions . . . shall conform to the approved [management] plan." Plaintiffs claim that the BLM has failed to comply with its Management Framework Plans, Resource Management Plans, and the pertinent amendments to those documents. They contend that the BLM has failed to protect the four WSAs at issue here from impairment, as required by the Resource Management Plans governing them, and that BLM has failed to implement the protections to which it committed in the planning documents for the Henry Mountains Resource Area and the San Rafael Resource Areas.

Plaintiffs' first argument is essentially the same as the FLPMA § 603 claim discussed above, and thus, it will not be discussed again here. Regarding their claim that the BLM has failed to implement portions of the RMPs for the San Rafael and Henry Mountain Resource Areas, Plaintiffs' claim is, again, a claim regarding the sufficiency of BLM's actions, rather than a failure to carry out a clear, ministerial duty.

The regulation, 43 C.F.R. § 1610.5-3(a), states that "[a]ll future resource management authorizations and actions . . . and subsequent more detailed or specific planning, shall conform to the approved plan." This language appears, on its face, to be limited only to affirmative projects either approved or undertaken after the RMP is in place; it does not require that further planning activities contemplated by the plan actually take place. Plaintiffs have not identified some site-specific action taken by the BLM that does not conform to the plan; rather, they claim that further planning activities specified in the RMPs did not occur.

This claim, then, does not amount to a genuine 706(1) claim. *See e.g., Ecology Center v. U.S. Forest Service*, 192 F.3d at 926; *ONRC Action*, 150 F.3d at 1139 (explicitly rejecting 43 C.F.R. § 1610.5 as a possible basis for APA § 706(1) jurisdiction). Even the consistency requirement of § 302(a) of FLPMA ("The Secretary shall manage the public lands . . . in accordance with the land use plans") does not assist Plaintiffs here. While the BLM's actions have not been carried out to the letter, there has not been a complete failure to perform a legally required duty that would trigger a review under § 706(1).

3. Executive Orders and Regulations

Executive Order 11644 provides that ORV use shall only be permitted on public lands in accordance with the following criteria:

> (a) Areas and trails shall be located to minimize damage to soil, watershed, vegetation, air, or other resources of the public lands, and to prevent impairment of wilderness suitability.
>
> (b) Areas and trails shall be located to minimize harassment of wildlife or significant disruption of wildlife habitats. Special attention will be given to protect endangered or threatened species and their habitats.
>
> (c) Areas and trails shall be located to minimize conflicts between off-road vehicle use and other existing or proposed recreational uses of the same or neighboring public lands, and to ensure the compatibility of such uses with existing conditions in populated areas, taking into account noise and other factors.

37 Fed.Reg. 2877 (1972).[4] The BLM's ORV designation criteria regulations incorporate the terms of Executive Order 11644 almost verbatim. *See* 43 C.F.R. 8341.2

BLM argues that Plaintiffs are attempting to challenge the Resource Management Plans themselves, which are final decisions challengeable only under APA § 704, which Plaintiffs have never pleaded as a basis for jurisdiction, and they have not exhausted their administrative remedies in any event. In addition, BLM argues that Plaintiffs' argument, that illegal creation of trails in areas classified as "limited" in RMPs is a *per se* violation of the minimization criteria, is not correct. The BLM argues that the simple fact that illegal use is being made of some BLM lands does not amount to the affirmative creation of trails by BLM in violation of the minimization criteria, and Plaintiffs present no legal basis for imputing such illegal acts to the agency.

In addition, while Plaintiffs also argue that areas in the Parunuweap and Moquith Mountain WSAs are classified as "open" to cross-country ORV use, with user-creation of trails taking place, BLM contends that, to the extent that this is a claim of inadequate law enforcement, such a claim is not reviewable under the APA. *Heckler v. Chaney*, 470 U.S. 821, 832 (1985). BLM further argues and the court agrees that, to the extent Plaintiffs are contending that "open" designations for these areas violate the IMP, they are wrong. The only open areas on the Moquith WSA are the dunes areas, which have been the subject of extensive

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[4] Executive Order 11644 was amended by Executive Order 11989, which gave the BLM the authority to close areas of the public lands that were suffering "considerable adverse affects" from ORV use. 42 Fed.Reg. 26959 (1977).

analysis and management planning by BLM to comply with the IMP standard, which permits open areas in dunes. While certain areas of the Parunuweap WSA fall within "open" land designations under the Vermillion Management Framework Plan, testimony demonstrated that this Plan was developed and implemented before the Parunuweap WSA was designated and that management of the WSA itself has been under the IMP and limited to existing ways.

Accordingly, this claim cannot survives under § 706(1), and it must be dismissed.

B. SECTION 202 AREAS

Plaintiffs seek injunctive relief pertaining to specific areas not currently designated as WSAs, but which were identified by the BLM in its 1999 Wilderness Inventory process as having wilderness qualities.[5] The

[5] Prior to the preliminary injunction hearing, Plaintiffs sought to dismiss their Ninth Cause of Action without prejudice, as discussed below. BLM and Recreationists opposed that motion, arguing that it should be dismissed with prejudice. The court notified the parties that, in any event, the Ninth Cause of Action would be dismissed, and whether the dismissal would be with or without prejudice would be determined at a later date. In any event, that claim would not be at issue during the preliminary injunction hearing. The Ninth Cause of Action was premised on 41 C.F.R. § 1506.1(a) and targeted those areas now being considered by the BLM for possible designation as Wilderness Study Areas under FLPMA. These areas included lands adjacent to the Parunuweap, Behind the Rocks, and Indian Creek WSAs, as well as areas around Factory Butte, North Caineville Reef, and Wildhorse Mesa. With the dismissal of the Ninth Cause of Action, the question of whether these areas must be managed to protect wilderness values under the non-impairment standard of FLPMA Section 603, 43 U.S.C. § 1782(c), was no longer at issue in this case.

BLM is currently reviewing these areas under its planning authority to determine whether to give them WSA status. Referred to as "§ 202 areas," they include: the land adjacent to the Parunuweap, Behind the Rocks, and Indian Creek WSAs, as well as areas around Factory Butte, North Caineville Reef, and Wildhorse Mesa.

First, regarding the Factory Butte, North Caineville Reef, and Wildhorse Mesa areas, Plaintiffs contend that BLM has violated 43 C.F.R. § 1610.5-3(a) by failing to conform its actions to the terms of the Henry Mountains ORV Plan, the Henry Mountains Resource Area Management Framework Plan, and the San Rafael

During the week prior to the preliminary injunction hearing, Plaintiffs filed a Supplemental Memorandum Addressing Effect of Dismissal of Ninth Cause of Action. In that memorandum, Plaintiffs explained that it was still entitled to injunctive relief closing significant portions of these areas to further ORV use because they had alleged three claims that were not premised on the non-impairment mandate or the fact that these areas were being considered for WSA status. At the preliminary injunction hearing, on August 28, 2000, the BLM and Recreationists objected to Plaintiffs' attempt to keep alive issues pertaining to the § 202 areas, because they had believed that, with the dismissal of the Ninth Cause of Action, these areas would not be at issue during the preliminary injunction hearing because no other theories pertaining to these areas had been raised in Plaintiffs' briefs. Recreationists filed a motion in limine to exclude these theories. The court, however, denied the motion and allowed Plaintiffs to proceed with their theories pertaining to the § 202 areas. The court stated that, after further briefing from Plaintiffs after the hearing, the other parties would have an opportunity to respond to Plaintiffs' briefing and that a subsequent evidentiary hearing would be held, if necessary. Accordingly, after the hearing, Plaintiffs submitted further briefing on its Seventh Cause of Action—the Supplemental NEPA Claim—and BLM, Recreationists, and the State then filed responsive briefs.

Resource Management Plan. They claim that the BLM has failed to perform the monitoring required by the Henry Mountains plans and has failed to designate trails in "limited" areas in the San Rafael Resource Area, with the result that these areas are *de facto* open to cross-country ORV use.

Second, Plaintiffs argue that, in all of the non-WSA areas at issue, they have presented evidence that new trails are being created on the ground in violation of the public participation provisions of the Executive Orders and the BLM regulations. Thus, they are entitled to injunctive relief in light of the new trails that are being established on these areas.

Finally, Plaintiffs argue that, with regard to these areas, the BLM has violated 40 C.F.R. § 1502.9(c)(1) by failing to supplement existing NEPA analysis and documents to reflect current ORV user numbers, ORV use patterns, damaging ORV impacts, and the creation of new user-created ORV trails. NEPA requires such supplementation if "there are new circumstances or information relevant to the environmental concerns and bearing on the proposed actions or its impacts." 40 C.F.R. § 1502.9(c)(1).

Plaintiffs argue that the land use plans encompassing the non-WSA areas at issue (i.e., the Vermillion Management Framework Plan, the Henry Mountain Management Framework Plan and Off-Road Vehicle Implementation Plan, and the San Juan, San Rafael, and Grand Resource Management Plans) all presuppose two things: (1) that ORV user figures would remain static, and (2) that additional NEPA planning, along with other implementation measures (i.e., monitoring, signing, trail maps, etc.) were prerequisites to comply with the terms of the plans themselves. Plaintiffs claim that

they have presented evidence that, although neither of these suppositions have occurred, the BLM has failed to engage in additional NEPA analysis. They claim that ORV user figures have skyrocketed in the past ten years, when the most recent NEPA land use plans at issue were completed, and yet the Kanab, Monticello, Price, Moab, and Henry Mountains Field Station offices have not updated their NEPA analysis.

Again, BLM and Recreationists argue that an agency decision to amend or revise land management plans or to perform supplemental NEPA analysis is not a clearly defined, ministerial duties, but rather, requires considerable discretion and judgment, as does the timing and pace of such process once it is undertaken.

Plaintiffs' claims regarding the § 202 areas suffer the same deficiency as their claims regarding the WSAs. The regulations upon which Plaintiffs rely reek of discretion. This court cannot conclude, after listening to the testimony and considering the parties' post-hearing briefs regarding Plaintiffs' Seventh Cause of Action—particularly the Declaration of Douglas M. Koza, the Deputy State Director, Natural Resources for the Utah State BLM—that the BLM has abdicated a mandatory, nondiscretionary duty.

Mr. Koza has provided a detailed account of the BLM's extensive planning workload, including the actions that have been taken in the recent past, current actions, and actions that are planned for the future. In addition, the BLM's planning efforts are tied to complex budget and other resource variables that require setting priorities for major planning efforts on both a national and state level. This means that the agency is unable to address every perceived need at once and that priorities must be set based on management

judgment as to how such needs can be best met within the context of all the other demands for funding and resources that are inherent in the management of 23 million acres of public lands in Utah. The BLM has recognized that ORV use on public lands generally has increased over the past few years and is taking steps to deal with the implications and effects.

Plaintiffs claim that BLM has failed to take the required "hard look" at the question of whether increased ORV activity amounts to new information or new circumstances that warrant supplemental NEPA analysis, and claim that the inescapable conclusion must be that the new circumstances unanticipated by existing NEPA documents, skyrocketing ORV use, and environmental impacts *require* supplemental NEPA. However, that conclusion is not justified on the evidence before the court. The court cannot state that the agency "has a clear duty to act under NEPA or FLPMA." *See ONRC Action*, 150 F.3d at 1137. Indeed, the decision whether to prepare a supplemental environmental impact statement is the kind of factual question that implicates agency technical expertise and requires courts to "defer to the informed discretion of the responsible federal agencies." *Marsh*, 490 U.S. at 377 (quotation and citation omitted).

This court "is hesitant to upset an agency's priorities by ordering it to expedite one specific action and thus give it precedence over others." *Sierra Club v. Thomas*, 828 F.2d 783, 797 (D.C. Cir. 1987) (finding, in 706(1) case, that "a court is generally ill-suited to review the order in which an agency conducts its business.") While the court might agree with Plaintiffs that too little is done too slowly, the court cannot conclude

that BLM has abdicated its statutory responsibility for management.

III. MOTION TO DISMISS NINTH CAUSE OF ACTION

Plaintiffs have moved to dismiss their Ninth Cause of Action without prejudice. Recreationists, in the motion to dismiss discussed above, argued that the Ninth Cause of Action should be dismissed with prejudice. BLM originally moved to dismiss the Ninth Cause of Action with prejudice, but subsequently stated that, "at the time defendants filed their motion, it appeared that dismissal was warranted based only on the allegations of the pleadings and at this point, the issue appears more complicated. Thus, with the issue effectively gone from this case, in any event, and without waiving the merits of their motion to dismiss with prejudice, defendants advise the Court that they "do not oppose the dismissal, without prejudice, of plaintiffs' Ninth Cause of Action." United States' Response to Plaintiffs' Supplemental Briefing Re: Seventh Cause of Action at 2. Because the BLM does not oppose it, the court grants Plaintiffs' motion to dismiss the Ninth Cause of Action without prejudice.

IV. CONCLUSION

For the foregoing reasons, and good cause appearing, IT IS HEREBY ORDERED that

(1) Recreationists' Motion to Dismiss (docket # 123) is GRANTED, and Plaintiffs' First, Fifth, Six, and Seventh claims, to the extent they pertain to the WSAs and § 202 Areas addressed during the preliminary injunction hearing, are DISMISSED with prejudice. The Ninth Cause of Action, however, is not dismissed based upon this motion.

(2) Plaintiffs' Motion for Dismissal of Plaintiffs' Ninth Cause of Action (docket # 111) is GRANTED, and the Ninth Cause of Action in the Second Amended Complaint is DISMISSED without prejudice;

(3) Plaintiffs' Motion for a Preliminary Injunction (docket # 53) is DENIED AS MOOT;

(4) BLMs' Motion for Dismissal of Plaintiffs' Ninth Cause of Action with Prejudice (docket # 117) is MOOT, as BLM has now stated that it does not oppose dismissal without prejudice.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 01-4009
D.C. NO. 2:99-cv-852-K

SOUTHERN UTAH WILDERNESS ALLIANCE, A UTAH NON-PROFIT CORPORATION, ET AL.
PLAINTIFFS-APPELLANTS

v.

GALE NORTON, SECRETARY, UNITED STATES DEPARTMENT OF THE INTERIOR,
DEFENDANTS-INTERVENORS-APPELLEES

Filed: February 18, 2003

ORDER

Before: Ebel, McKay and Lucero, Circuit Judges

Appellees' two petitions for rehearing are denied.

The petitions for rehearing en banc were transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, the petitions are also denied.

Entered for the Court

/s/ PATRICK FISHER
PATRICK FISHER
CLERK OF COURT

Nos. 02-1703 and 03-101

FILED
SEP 24 2003
OFFICE OF THE CLERK

In The
Supreme Court of the United States

UTAH SHARED ACCESS ALLIANCE, *et al.*,
Petitioners,
v.
SOUTHERN UTAH WILDERNESS ALLIANCE, *et al.*,
Respondents.

GAIL NORTON, Secretary of the Interior, *et al.*,
Petitioners,
v.
SOUTHERN UTAH WILDERNESS ALLIANCE, *et al.*,
Respondents.

On Petitions For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION TO PETITIONS FOR A WRIT OF CERTIORARI

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94 pp

QUESTIONS PRESENTED

1. Whether this Court should accept review of this case at an interlocutory stage when the Bureau of Land Management (BLM) has not been ordered to take any action, and when further proceedings may moot or narrow petitioners' concerns.

2. Whether the district court had authority under the Administrative Procedure Act, 5 U.S.C. § 706, to consider a claim that BLM failed to satisfy its mandatory duty to prevent the impairment of four specific wilderness study areas.

3. Whether the district court had authority under the Administrative Procedure Act, 5 U.S.C. § 706, to consider a claim that BLM had failed to comply with its mandatory duty to "manage the public lands . . . in accordance with . . . land use plans," when it was undisputed that the agency had not taken the two land use plan actions at issue.

4. Whether the district court had authority under the Administrative Procedure Act, 5 U.S.C. § 706, to decide whether BLM violated the National Environmental Policy Act by failing to consider significant increases in off-road vehicle use on specified BLM lands in Utah.

PARTIES TO THE PROCEEDINGS

The following are parties to this proceeding:

1. Petitioners:

Gale Norton, Secretary of the Interior
Kathleen Clarke, Director of the Bureau of Land Management
Bureau of Land Management
Utah Shared Access Alliance
The Blue Ribbon Coalition, Inc.
Elite Motorcycle Tours
Anthony Chatterly

2. Respondents:

Southern Utah Wilderness Alliance
The Wilderness Society
Sierra Club
Great Old Broads for Wilderness
Wildlands CPR
Utah Council of Trout Unlimited
American Lands Alliance
Friends of the Abajos
State of Utah
San Juan County, Utah
Emery County, Utah
Wayne County, Utah
Kane County, Utah
Utah School and Institutional Trust Lands Administration

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Southern Utah Wilderness Alliance, The Wilderness Society, Sierra Club, Great Old Broads for Wilderness, Wildlands CPR, Utah Council of Trout Unlimited, American Lands Alliance, and Friends of the Abajos have no parent companies and issue no corporate stock.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS ii

RULE 29.6 CORPORATE DISCLOSURE STATEMENT iii

TABLE OF AUTHORITIES vi

INTRODUCTION 1

STATEMENT OF THE CASE 3

A. STATUTORY BACKGROUND 3

1. FLPMA'S NONIMPAIRMENT REQUIREMENT 3

2. FLPMA LAND USE PLANNING AND THE ACCOMPANYING ENVIRONMENTAL REVIEW PROCESS 4

B. THE PROCEEDINGS BELOW 5

REASONS FOR DENYING THE PETITION 10

I. THE PROCEDURAL POSTURE OF THIS CASE RENDERS IT AN INAPPROPRIATE CANDIDATE FOR SUPREME COURT REVIEW 10

II. THE DECISION BELOW DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT OR OF ANY COURT OF APPEALS 13

III. THE ISSUES THAT BLM RAISES IN ITS PETITION REVIEW ARE NOT PRESENTED IN THIS CASE. 17

IV. THE TENTH CIRCUIT'S DECISION TO ALLOW SUWA'S UNEXCEPTIONAL APA CLAIMS TO PROCEED IS CONSISTENT WITH THE TREATMENT OF SUCH CLAIMS BY OTHER COURTS 21

CONCLUSION 26

TABLE OF AUTHORITIES

CASES

Adams v. Richardson,
480 F.2d 1159 (D.C. Cir. 1973) 23

American Construction Co. v. Jacksonville, Tampa & Key West Railway Co.,
148 U.S. 372 (1893) 11

Bennett v. Spear, 520 U.S. 154 (1997) 21

Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R. Co., 389 U.S. 327(1967) 10

Center for Biological Diversity v. Veneman,
335 F.3d 849 (9th Cir. 2003) 16, 23

Darst-Webbe Tenant Ass'n Board v. St. Louis Housing Authority, 339 F.3d 702 (8th Cir. 2003) 23

Davis Associates, Inc. v. Secretary, Department of Housing & Urban Development,
498 F.2d 385 (1st Cir. 1974) 25

Ecology Center Inc. v. United States Forest Service,
192 F.3d 922 (9th Cir. 1999) 16

Edgerton v. Kingsland,
168 F.2d 128 (D.C. Cir. 1947) 25

Flynn v. Schultz, 748 F.2d 1186 (7th Cir. 1984) 25

Forest Guardians v. Babbitt,
174 F.3d 1178 (10th Cir. 1999) 23

Hamilton-Brown Shoe Co. v. Wolf Brothers & Co.,
240 U.S. 251 (1916) 10

Huck v. BLM, IBLA No. 2003-169 19

Hughes River Watershed Conservancy v. Glickman,
81 F.3d 437 (4th Cir. 1996) 5, 20

Idaho Watersheds Project v. Hahn,
307 F.3d 815 (9th Cir. 2002) 25

Iowa ex rel. Miller v. Block,
771 F.2d 347 (8th Cir. 1985) 23

Lujan v. National Wildlife Federation,
497 U.S. 871 (1990) 13, 14, 15, 16

Marquez-Ramos v. Reno,
69 F.3d 477 (10th Cir. 1995) 25

Marsh v. Oregon Natural Resources Council,
490 U.S. 360 (1989) 5, 20

Mausolf v. Babbitt, 125 F.3d 661 (8th Cir. 1997) 18

Montana Wilderness Ass'n v. United States Forest Service, 314 F.3d 1146 (9th Cir. 2003) 16, 23, 24

NAACP v. Secretary of Housing and Urban Development, 817 F.2d 149 (1st Cir. 1987) 22

Nike, Inc. v. Kasky, 123 S. Ct. 2554 (2003) 12

Norton v. BLM, IBLA No. 2003-171 19

Ohio Forestry Ass'n v. Sierra Club,
523 U.S. 726 (1998) 16, 18, 19

Public Citizen Health Research Group v. Commissioner, Food & Drug Administration,
740 F.2d 21 (D.C. Cir. 1984) 23

Sierra Club v. Hodel, 848 F.2d 1068 (10th Cir. 1988) 4

Sierra Club v. Peterson,
228 F.3d 559 (5th Cir. 2000) 15, 16

Southeastern Utah OHV Club v. BLM,
IBLA No. 2003-172 19

South Trenton Residents Against 29 v. Federal Highway Admin., 176 F.3d 658 20

Telepak v. BLM, IBLA No. 2003-170 19

Village of Grand View v. Skinner,
947 F.2d 651, 657 (2d Cir. 1991) 20

Virginia Military Institute v. United States,
508 U.S. 946 (1993) 10

Wilbur v. United States ex rel. Kadrie,
281 U.S. 206 (1930) 25

STATUTES, REGULATIONS, AND RULES

5 U.S.C. § 551(13) 22
5 U.S.C. § 553(e) 22
5 U.S.C. § 706 7
5 U.S.C. § 706(1) ..... *passim*
5 U.S.C. § 706(2)(A) 17
16 U.S.C. § 1131(c) 3
16 U.S.C. § 1132(b) 3
42 U.S.C. § 4332(2)(C) 5
43 U.S.C. §§ 1701-1784 3
43 U.S.C. § 1712(f) 4
43 U.S.C. § 1732(a) 4
43 U.S.C. § 1782(a) 3
43 U.S.C. § 1782(c) 3-4, 6, 18, 21
40 C.F.R. §§ 1500-1508 5
40 C.F.R. § 1502.9(c)(1)(ii) 5
43 C.F.R. § 1610.2 4
43 C.F.R. § 1610.5-3(a) 5, 20
FED. R. CIV. P. 54(b) 8

MISCELLANEOUS

Robert L. Stern, Eugene Gressman, Stephen M. Shapiro, & Kenneth S. Geller, *Supreme Court Practice* (8th ed. 2002) 11

Attorney General's Manual on the Administrative Procedure Act (1947) 21-22

http://www.ut.blm.gov/sanrafaelohv/wthedecision.htm 19

http://www.ut.blm.gov/sanrafaelohv/wtheplan.htm 6

INTRODUCTION

Petitioners in this case sought the dismissal under Rule 12(b)(1) of Respondents' (collectively "SUWA's") claims that the Bureau of Land Management (BLM) violated three of the agency's mandatory statutory duties: (1) the duty under the Federal Land Policy and Management Act (FLPMA) to prevent the impairment of wilderness study areas (WSAs), 43 U.S.C. § 1782(c); (2) the duty under FLPMA to "manage the public lands . . . in accordance with . . . land use plans," 43 U.S.C. § 1732(a); and (3) the duty under the National Environmental Policy Act (NEPA) to determine whether new information triggers the agency's duty to prepare supplemental environmental analyses. In the course of the proceedings below, BLM admitted that: (1) the agency *was* allowing the four WSAs at issue to be impaired by off-road vehicle (ORV) use; (2) the agency had *not* taken the particular actions set out in the two relevant land use plans; and (3) the agency had *never* considered whether the explosive increase in ORV use required it to prepare supplemental NEPA analyses for the five BLM areas identified by SUWA. BLM App. at 25a-26a, 32a-33a; App. at 58-59.[1] Despite these admissions and the overwhelming evidence that BLM had failed to satisfy these statutory mandates, the agency argues that the district court did not even have authority to consider the merits of SUWA's claims. The Tenth Circuit correctly rejected petitioners' arguments and further review by this Court is unwarranted.

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[1] This brief refers to the Petition for a Writ of Certiorari filed by Gale Norton *et al.* as "BLM Pet." and its appendix as "BLM App." The Petition for a Writ of Certiorari filed by the Utah Shared Access Alliance *et al.* (the "ORV Intervenors") is cited as "ORV Pet." The appendix to the instant opposition to the petitions is cited to as "App."

First, the procedural posture of this appeal renders it an unfit vehicle for Supreme Court review. Because this is an interlocutory appeal of a jurisdictional ruling concerning only a subset of SUWA's claims, the concerns raised in the petitions may be clarified or even mooted through further proceedings in the lower courts. This possibility is particularly acute here because, as often occurs when cases are still at an early pleading stage, SUWA's allegations and asserted bases for relief have evolved since the Tenth Circuit issued its decision. In addition, BLM has itself asserted in the courts below that one of the primary claims at issue in its petition is now moot.

Second, the Tenth Circuit's decision does not conflict with any opinion of this Court or of any court of appeals. BLM's effort to manufacture such a conflict mischaracterizes SUWA's claims and the proceedings below. BLM accuses SUWA of mounting a "wholesale" or "programmatic challenge" to BLM's failure to comply with "general statutory standards." BLM Pet. at 9, 12. This is incorrect. SUWA challenged BLM's failure to comply with three discrete and well-defined statutory mandates based on equally discrete facts concerning ORV use on specific BLM lands. Nor did the Tenth Circuit sanction a "programmatic challenge," as BLM claims. The court simply held that the district court had authority under 5 U.S.C. § 706(1) to consider whether the agency had violated specific statutory requirements.

Third, the issues raised by BLM concerning judicial review are not squarely presented in this case. Because of the factual and legal specificity of SUWA's claims, this case does not offer the Court occasion to decide whether courts may hear a "broad programmatic challenge" to the alleged violation of "general statutory standards." Nor does this case present the question of whether the APA empowers a court to compel non-final agency action because the actions that SUWA seeks to compel are, in fact, "final" under the APA.

Fourth, SUWA's unexceptional APA claims are of the sort that have been addressed routinely by courts in the past. The Tenth Circuit's limited ruling allowing this case to proceed broke no new legal ground by holding that the district court had authority to consider whether BLM had failed to comply with clear statutory mandates.

For all of these reasons, the petitions should be denied.

STATEMENT OF THE CASE

A. Statutory Background

1. FLPMA's Nonimpairment Requirement

In 1976, Congress passed FLPMA, 43 U.S.C. §§ 1701-1784, which governs the management of BLM lands. Among many other things, FLPMA required BLM to review and recommend lands for inclusion within the National Wilderness Preservation System. 43 U.S.C. § 1782(a). In order to be eligible for wilderness designation, an area must generally be at least 5,000 acres in size and "generally appear[] to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable." 16 U.S.C. § 1131(c).

By 1984, BLM had concluded that 3.2 million acres of its lands in Utah qualified as potential wilderness. These areas are called "wilderness study areas," or "WSAs." Because Congress – the sole body legally capable of designating wilderness areas, 16 U.S.C. § 1132(b) – has not yet designated these areas as wilderness or determined that it will not do so, these 3.2 million acres remain classified as WSAs and must be managed pursuant to § 603(c) of FLPMA, 43 U.S.C. § 1782(c). That section mandates that:

> During the period of review of such areas [*i.e.*, WSAs] and until Congress has determined otherwise, the Secretary *shall continue to manage such lands* according to his authority under this Act

> and other applicable law in a manner *so as not to impair the suitability of such areas for preservation as wilderness*.

43 U.S.C. § 1782(c) (emphases added). Through this requirement – which is referred to colloquially as the "nonimpairment mandate" – Congress has reserved to itself the final say as to whether WSAs ultimately become designated wilderness.

BLM interprets FLPMA's nonimpairment requirement through its Interim Management Policy (IMP). *See Sierra Club v. Hodel*, 848 F.2d 1068, 1086 (10th Cir. 1988), *overruled on other grounds*, *Village of Los Ranchos De Albuquerque v. Marsh*, 956 F.2d 970 (10th Cir. 1992). In the IMP, BLM determined that WSAs are "impaired" in violation of FLPMA whenever ORV riders drive off-road because "the tracks created by the vehicles leave depressions or ruts, compact the soils and trample or compress vegetation." BLM App. at 15a n.7.

2. FLPMA Land Use Planning And The Accompanying Environmental Review Process

The Utah BLM is divided into field offices for purposes of management and administration. FLPMA requires each BLM field office to develop a land use plan for its area pursuant to a process that affords extensive opportunities for public involvement and environmental review under NEPA. *See* 43 U.S.C. § 1712(f) (public participation requirement); 43 C.F.R. § 1610.2 (same). Land use plans specify which activities – from mining to camping – will be permitted, and the location and conditions under which they will be allowed. 43 U.S.C. § 1732(a).

FLPMA mandates that BLM "shall manage the public lands . . . in accordance with . . . land use plans." 43 U.S.C. § 1732(a). This mandatory language is echoed in FLPMA's

implementing regulations, which declare that "[a]ll future resource management authorizations and actions . . . *shall conform to the approved plan*." 43 C.F.R. § 1610.5-3(a) (emphasis added).

Prior to finalizing a land use plan, BLM must comply with the public participation and environmental review requirements of NEPA, which require a federal agency to prepare an environmental impact statement (EIS) for major federal actions, such as land use plans, that may significantly affect the environment. 42 U.S.C. § 4332(2)(C); 40 C.F.R. §§ 1500-1508 (NEPA regulations). BLM's NEPA duties do not end once the agency completes its initial EIS for a FLPMA land use plan. NEPA's regulations require federal agencies to "prepare supplements to either draft or final environmental impact statements if . . . [t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R § 1502.9(c)(1)(ii). *See also Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 371 (1989); *Hughes River Watershed Conservancy v. Glickman*, 81 F.3d 437, 443 (4th Cir. 1996).

B. The Proceedings Below

ORVs pose a significant threat to the ecological health of the fragile desert lands managed by BLM in Utah and have eroded the soils, trampled vegetation, destroyed cultural relics, harmed water quality, harassed wildlife, and destroyed wildlife habitat. App. at 8-12 (second amended complaint).

Although BLM was required by NEPA to consider the environmental impacts of ORV use when it issued its Utah land use plans and decided where and how ORVs could be used, many of those plans are decades old and were prepared prior to the recent dramatic increase in ORV use in Utah. As a result, BLM's environmental analyses for many of its land use plans in Utah assumed far lower levels of ORV use – and

far less environmental impact – than actually is occurring today.

Even under the less pervasive ORV use of the past, several plans recognized and sought to address the ecological damage done by unrestricted ORV use. Two instances are relevant to these proceedings. The first is the 1991 San Rafael Resource Management Plan, which limited ORV use to designated roads and trails. However, the 1991 Plan left the actual designation of particular routes to a separate San Rafael Route Designation Plan, *which the agency committed to complete by 1992*. That Designation Plan still had not been completed when SUWA filed this case in 1999.

The second relevant land use plan commitment is set out in the 1990 Henry Mountains ORV Implementation Plan. Because BLM was particularly concerned with the damaging impacts of ORVs in the Factory Butte area, the 1990 Plan obligated BLM to conduct an intensive ORV monitoring program to determine whether ORV use should be restricted. BLM App. at 25a. BLM admitted that it had not conducted the required monitoring when SUWA filed this action a decade later. *Id.* at 25a-26a.[2]

Prior to filing this lawsuit, SUWA met with and wrote to BLM personnel to demand that the agency comply with particular legal duties concerning ORV use. SUWA specifically: (1) detailed the environmental damage being caused by ORVs in WSAs; (2) noted that this damage constituted "impairment" under 43 U.S.C. § 1782(c); (3) asked that specific WSAs be closed to ORV travel in order to prevent continued degradation and impairment; and (4)

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[2] Five months after SUWA filed this lawsuit, BLM initiated the long-promised monitoring program at Factory Butte. In addition, on February 3, 2003, BLM released its decade-overdue San Rafael Route Designation Plan. *http://www.ut.blm.gov/sanrafaelohv/wtheplan.htm* (BLM website describing decision).

urged BLM to comply with both of the specific land use plan commitments described *supra* at 6. App. at 50-57.

After failing to convince BLM to comply with its statutory duties, SUWA filed the instant action in late 1999. SUWA's second amended complaint presented ten causes of action under the APA, 5 U.S.C. § 706.[3] In 2000, SUWA moved for a preliminary injunction on four claims, three of which are relevant here: (1) that BLM had violated FLPMA's nonimpairment mandate by allowing ORVs to impair four specific WSAs; (2) that BLM had violated FLPMA's land use plan consistency requirement by failing to complete the San Rafael Route Designation Plan and by failing to conduct intensive ORV-monitoring in the Factory Butte area; and (3) that BLM had violated NEPA by failing to determine whether increases in ORV use triggered the agency's duty to supplement several particularly outdated NEPA analyses. SUWA asked the district court to issue a preliminary injunction prohibiting ORV use within the affected areas.

After hearing testimony, the district court concluded that SUWA had presented "significant evidence" that the alleged impairment "is occurring in the WSAs due to ORV use." BLM App. at 65a. The court ruled, however, that it lacked jurisdiction to consider SUWA's nonimpairment claim because FLPMA leaves BLM with "management options" regarding how the mandate could be satisfied, and because the agency had taken some minimal steps towards satisfying the mandate. *Id.* at 64a, 66a. The court held that it lacked jurisdiction to consider SUWA's land use plan consistency

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[3] On July 23, 2003, SUWA filed a third amended complaint, which did not include several of SUWA's earlier claims, narrowed SUWA's surviving claims, and, unlike its earlier complaints, stated explicitly that BLM's failures were "arbitrary, capricious, and otherwise not in accordance with law." App. at 41-45 (quoting 5 U.S.C. § 706(2)(A)).

claims because, in its view: (1) the agency had taken some steps to comply with those plans; and (2) the claim concerned management actions rather than the administration of future site-specific actions. *Id.* at 67a-68a. Finally, the court believed that it lacked jurisdiction over SUWA's supplemental NEPA claim because such claims involve agency expertise and thus, in the district court's view, could not be enforced pursuant to the APA. *Id.* at 74a. Having dismissed the claims to the extent they applied to the areas addressed in SUWA's preliminary injunction motion, the court denied that motion as moot. *Id.* at 76a. On February 9, 2001, the district court issued a Rule 54(b) certification entering final judgment on the claims raised in SUWA's preliminary injunction motion. App. at 48-49.

The Tenth Circuit, in an opinion written by Judge Ebel, reversed and remanded for further proceedings on the dismissed claims. BLM App. at 1a-39a. The court stated at the outset that, under § 706(1), "federal courts may order agencies to act only where the agency fails to carry out a mandatory, nondiscretionary duty." *Id.* at 10a. Jurisdiction exists in this case, the court concluded, because the duties SUWA seeks to enforce, including the nonimpairment duty, are each mandatory and non-discretionary. *Id.* at 5a, 26a, 34a-35a, 38a. The court rejected BLM's claim that jurisdiction is defeated because FLPMA leaves BLM with some discretion as to how to satisfy the nonimpairment requirement. *Id.* at 12a-15a. While this discretion may go to the merits of SUWA's nonimpairment claim or the propriety of any injunctive relief, it did not deprive the court of jurisdiction. *Id.* at 14a.

The court then rejected BLM's argument that a mandatory statutory duty is unenforceable if an agency may be able to satisfy that duty through non-final action. BLM's position, the court held, "read[s] finality in an inappropriately cramped manner" by ignoring the fact that an agency's failure to carry out a mandatory statutory duty is

equivalent under the APA to a final decision declaring that it will not comply with the duty. *Id.* at 16a-18a. The court also rejected BLM's "final action" argument because: (1) it was inconsistent with case law indicating that a court may compel an agency to satisfy a duty even if the agency has discretion concerning how the duty may be satisfied; (2) it would create a "no-man's land" of judicial review where agencies could flout mandatory statutory duties; and (3) many of the steps that BLM might take to prevent impairment would be final action, including the road closures sought by SUWA in its preliminary injunction motion. *Id.* at 18a n.10.[4]

The court also rejected the argument that an agency can immunize itself from § 706(1) review by taking some steps – no matter how insubstantial or ineffective – towards someday satisfying its statutory mandate. While "BLM should be credited for the actions it has taken to comply with the nonimpairment mandate," the court explained, "it does not follow [that those steps] ... deprive[] a court of subject matter jurisdiction to determine whether it has actually fulfilled the statutorily mandated duty and potentially compel action if that duty has not been fulfilled." *Id.* at 20a.

The Tenth Circuit also reversed the district court's ruling that it was unable to review SUWA's land use plan claim. Dismissal was improper, the Tenth Circuit concluded, because "a straightforward reading of the relevant L[and] U[se] P[lans], as well as applicable statutes and regulations,

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[4] BLM states that the Tenth Circuit concluded that courts have jurisdiction over "'day-to-day management actions' such as BLM's ongoing management of the wilderness study areas." BLM Pet. at 7. This is incorrect. The Tenth Circuit's reference to "day-to-day management actions," which BLM quotes in its petition, is drawn from BLM's characterization of the issue in its own Tenth Circuit brief. BLM App. at 15a-16a. The Tenth Circuit never adopted this view of the issue.

suggests that the BLM must carry out specific activities promised in the" plans. *Id.* at 26a-27a. While "BLM can draft L[and] U[se] P[lan]s in a way that optimizes the agency's ability to respond to changing circumstances and conditions . . . , BLM cannot 'ignore the requirements of the . . . Plan'" *Id.* at 27a (quoting *Sierra Club v. Martin*, 168 F.3d 1, 4 (11th Cir. 1999)); *see also id.* at 29a-30a (rejecting lower court's view that BLM need only comply with its land use plans when the agency undertakes future, site-specific projects).

While Judge McKay dissented from the majority's nonimpairment and plan consistency holdings, the panel unanimously reversed the district court's dismissal of SUWA's supplemental NEPA claim. The district court, the Tenth Circuit concluded, has jurisdiction over SUWA's claim that unanticipated increases in ORV use in several areas triggered BLM's duty to determine whether the agency must prepare supplemental environmental analyses. *Id.* at 37a-39a.

REASONS FOR DENYING THE PETITION

I. The Procedural Posture Of This Case Renders It An Inappropriate Candidate For Supreme Court Review.

This Court has a long tradition of declining petitions for review in cases whose claims have not each been fully resolved by the lower courts. *Virginia Military Inst. v. United States*, 508 U.S. 946 (1993) (Scalia, J., concurring in denial of certiorari). This tradition is based on the "pruden[ce]" inherent in allowing lower courts to resolve and clarify issues so that this Court may conserve its limited resources. *Id.*; *see also Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R. Co.*, 389 U.S. 327, 328 (1967) (per curiam); *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) (certiorari jurisdiction is "to be exercised sparingly . . . [a]nd, except in

extraordinary cases, the writ is not issued until final decree"); *American Constr. Co. v. Jacksonville, Tampa & Key West Ry. Co.*, 148 U.S. 372, 384 (1893). As the Solicitor General has noted many times, where "the court of appeals [has] remanded the case to the district court . . . this Court ordinarily does not review interlocutory decisions." *See, e.g.*, Cert. Op. at 6, *Tocco v. United States*, No. 02-1225 (2003); Cert. Op. at 11, *Hsia v. United States*, No. 99-680 (1999). Where further proceedings remain, issues raised in a petition for a writ of certiorari may be mooted or narrowed in the lower courts, sparing this Court from expending its resources inefficiently. *See* Robert L. Stern, Eugene Gressman, Stephen M. Shapiro, & Kenneth S. Geller, Supreme Court Practice § 4.18 at 260 (8th ed. 2002) ("in the absence of [an] unusual factor, the interlocutory nature of a lower court judgment will generally result in the denial of certiorari").

Further proceedings in the courts below may moot or narrow petitioners' concerns in this case. While BLM raises the ominous prospect of intrusive judicial relief that would "significantly disrupt[]" the government's ability to manage the public lands, BLM Pet. at 27, no such relief has been granted in this case. Because SUWA's claims were dismissed at such an early stage, the courts below have never had the opportunity to determine whether SUWA should prevail on the merits, let alone the nature of any appropriate injunctive relief. The Tenth Circuit decided only that SUWA had a right to pursue its claims and the court was at pains to stress the "narrow" nature of its ruling and to emphasize that the merits of SUWA's claims will "need to be addressed on remand." BLM App. at 3a.

On remand, the lower courts might find that SUWA's claims fail on the merits, that equitable considerations do not justify the relief that SUWA seeks, that SUWA is entitled to such relief on wholly separate grounds, or that some other form of injunctive relief is more appropriate. A court might, for instance, order BLM to comply with the nonimpairment

mandate and carry out its land use plan commitments within a specified time and detail consequences for any failure to do so. Alternatively, a court might provide an interpretation of BLM's nonimpairment duty under FLPMA and require the agency to act in light of that interpretation.[5] Given the range of plausible outcomes, it is wholly uncertain to what extent – if any – petitioners' concerns may ultimately present themselves in this litigation. Only by denying the petitions and allowing this case to proceed in the courts below will that uncertainty be resolved.

Further militating against Supreme Court review at this point is the fact that the proceedings thus far have dealt with only a subset of SUWA's claims. *See supra* at 7. Granting the petitions for a writ of certiorari at this point could result in a piecemeal review of just the sort disfavored by this Court. *See Nike, Inc. v. Kasky*, 123 S. Ct. 2554, 2557 (2003) (dismissing a writ as improvidently granted and noting that "even if we were to decide the First Amendment issues presented to us today, more First Amendment issues might well remain in this case, making piecemeal review of the Federal First Amendment issues likely") (Stevens, J., concurring in dismissal of writ as improvidently granted). Furthermore, the presence of additional claims raises the possibility that SUWA may win injunctive relief pursuant to one of its as-yet-unadjudicated claims, in which case this Court's efforts would have no impact on the ground in Utah.[6]

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[5] If the court were to take this route, it would be exercising what even BLM admits is a court's legitimate ability to "require an agency to take action upon a matter, without directing how it shall act." BLM Pet. at 16 (quoting Attorney General's Manual on the Administrative Procedure Act (1947) at 108).

[6] The picture here is clouded still further by the fact that SUWA's third amended complaint altered its legal claims by alleging that BLM's inaction has been "arbitrary, capricious, or otherwise not in accordance with law." App. at 41-45 (quoting 5 U.S.C. § 706(2)(A), a provision that is not addressed in either of the petitions to this Court).

A final reason for denying review, particularly over SUWA's land use plan consistency claim, is that BLM has begun to implement the provisions that underlie SUWA's claim. *Supra* at 6 n.2. BLM argued below that the agency's compliance with these long-ignored obligations moots SUWA's claim. BLM App. at 31a n.17 (Tenth Circuit acknowledging BLM's mootness argument). This Court ought not spend its scarce resources resolving claims that might be dismissed on remand as moot.

II. The Decision Below Does Not Conflict With Any Decision Of This Court Or Of Any Court Of Appeals.

BLM bases its petition in large part on an alleged conflict between the decision below and *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990). No such conflict exists.

First, *Lujan* deals exclusively with standing. This is apparent from the opening line of the *Lujan* opinion, which declares that "[i]n this case we must decide whether respondent…is a proper party to challenge actions of the Federal Government." *Lujan*, 497 U.S. at 875. The opinion never cites 5 U.S.C. § 706(1), the section at issue here, and never considers the extent of a court's authority to consider claims that an agency has failed to comply with statutory mandates. Accordingly, there is no direct conflict with *Lujan* which would warrant Supreme Court review.

Second, the portion of *Lujan* upon which BLM relies turned entirely upon the programmatic nature of the plaintiffs' claims in that case. BLM Pet. at 11-12 (discussing *Lujan*, 497 U.S. at 891-94). Rather than challenge any specific agency decision or failure to act, the plaintiffs in *Lujan* sought "wholesale" improvement in the government's so-called "land withdrawal review program," which was

plaintiffs' shorthand reference for all of the 1,250 or so discrete public lands management decisions made pursuant to a host of FLPMA requirements. *Lujan*, 497 U.S. at 875-89. Although the plaintiffs alleged that legal violations were rampant within the "program," they did not narrowly challenge the government's failure in any particular instance to comply with any particular statute.[7] Indeed, the claims in that case were so exceptionally broad that the *Lujan* court understood the plaintiffs to be challenging even "actions yet to be taken." *Id.* at 893. Given their exceptional breadth, it is not surprising that the *Lujan* court saw plaintiffs' claims as an attempt at the "wholesale improvement of this program by court decree." *Id.* at 891.

SUWA's claims bear no resemblance to the sweeping programmatic claims raised in *Lujan*. Unlike the plaintiffs in *Lujan*, the three claims pursued in SUWA's preliminary injunction motion challenge BLM's failure to comply in particular respects with specific and well-defined legal duties on particular BLM lands. The first claim alleged that BLM was violating FLPMA's nonimpairment duty in four specific WSAs. *See* BLM App. at 6a-7a n.3. The second claim alleged that BLM's failure to comply with two area-specific land use plan provisions violated FLPMA's land use plan

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[7] BLM cites *Lujan* for the proposition that judicial review is not available to address an agency's failure to revise its land use plans, failure to prepare an adequate EIS, failure to consider multiple uses, and failure to provide the statutorily required public notice. BLM Pet. at 17. BLM misreads *Lujan*. This Court made plain in that case that any of these failures could be challenged on a "case-by-case" basis. *Lujan*, 497 U.S. at 894. What a plaintiff may not do under *Lujan* is to seek the wholesale improvement of an agency's behavior by alleging generally that some agency "program" is riddled with illegality. Because SUWA has challenged BLM's failure to take specific actions for violating specific statutes, the Tenth Circuit's decision below does not conflict with *Lujan*.

consistency requirement. *Id.* at 25a-26a. The third claim alleged that BLM violated NEPA by failing to determine whether dramatic increases in ORV use in five specific areas in Utah triggered the agency's duty to supplement particular NEPA analyses. *Id.* at 32a. Thus, SUWA has done what the *Lujan* plaintiffs did not: it specified clear legal obligations being violated in specific areas and sought to compel specific agency actions to bring BLM into compliance with the law.

BLM's claim that this case conflicts with *Sierra Club v. Peterson*, 228 F.3d 559 (5th Cir. 2000), is similarly unconvincing. BLM Pet. at 9. Like the plaintiffs in *Lujan*, the Sierra Club in *Peterson* raised a sweeping challenge to an agency's entire program. Rather than challenge any particular timber sale on the grounds that it violated a particular statute, the Sierra Club challenged the Forest Service's general management approach over the prior two decades on the Texas national forests. *Id.* at 563-64.

SUWA's claims are entirely different from the program-wide claim pursued by the Sierra Club in *Peterson*. First, while the Sierra Club raised programmatic claims that swept across every acre of the Texas national forests, SUWA's claims target site-specific legal violations. Second, while the Sierra Club tried to use *past* legal violations to enjoin all *future* timber sales – future sales that the Club had not actually proven would be illegal – SUWA seeks site-specific relief that would remedy the existing harm caused by the agency inaction that gave rise to SUWA's claims. Third, whereas the source of the alleged violations in *Peterson* were affirmative agency actions – *i.e.*, past timber sales – that the Sierra Club tried to recast, in the alternative, as instances of inaction, the violations complained of by SUWA stem from true failures to act: BLM's failure to prevent cross-country ORV travel from impairing four WSAs, failure to comply with the requirements of two land use plans, and failure to

determine whether new information triggered the duty to prepare five supplemental NEPA analyses.[8]

This case is distinguishable from *Lujan* and *Peterson* in another important respect. Whereas the courts stressed in both of those cases that the plaintiffs could pursue their challenges on a case-by-case basis, BLM's arguments in this case would leave SUWA without any legal remedy. *Lujan*, 497 U.S. at 894; *Peterson*, 228 F.3d at 568-69; *see also id.* at 571-72 (Higginbotham, J., concurring). Before any environmental impact is felt from a land withdrawal or timber sale decision of the sort at issue in *Lujan* or *Peterson*, the agency must take formal action by approving the withdrawal decision or timber sale. *See Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 729-30 (1998) (discussing two-stage process for timber sales). As the *Lujan* and *Peterson* courts appreciated, such decisions are final agency actions that may be challenged and enjoined in a site-specific case.

The instant case is quite different. Unlike logging and land withdrawals, no additional final agency action is necessary for cross-country ORV use in Utah's WSAs to continue and expand into the future, thereby furthering the impairment of the WSAs that Congress ordered protected.

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[8] ORV Intervenors suggest that the decision below is inconsistent with *Ecology Center. Inc. v. United States Forest Service*, 192 F.3d 922 (9th Cir. 1999), which they insist stands for the proposition that courts lack jurisdiction under § 706(1) if an agency has taken *some* action towards someday satisfying its statutory duty. ORV Pet. at 25. However, in *Montana Wilderness Ass'n v. United States Forest Serv.*, 314 F.3d 1146, 1151 (9th Cir. 2003), *petitions for cert. filed*, 72 U.S.L.W. 3106 (U.S. July 22, 2003) (No. 03-109); 72 U.S.L.W. 3106 (U.S. July 22, 2003) (No. 03-123), a subsequent Ninth Circuit panel (which included two of the judges from *Ecology Center*), rejected this reading of *Ecology Center*. *See also Center for Biological Diversity v. Veneman*, 335 F.3d 849, 857 (9th Cir. 2003).

Because no further agency action is required, SUWA may *never* have the opportunity to challenge BLM's violation of the nonimpairment requirement in the context of an affirmative challenge to an agency action.[9] Therefore, if SUWA cannot challenge an agency's violation of the nonimpairment mandate under 5 U.S.C. § 706(1), the agency could evade judicial review indefinitely by allowing ORVs to impair WSAs and never taking any final agency action to prevent the impairment.

III. The Issues That BLM Raises In Its Petition Are Not Presented In This Case.

BLM asks this Court to grant its petition for a writ of certiorari so that the Court may resolve two questions concerning judicial review: (1) whether a court may hear a "broad programmatic challenge" to the alleged violation of "general statutory standards"; and (2) whether a court may hear a challenge to agency inaction when the missing action would not itself be a "final agency action" under the APA. Neither issue, though, is presented in this case.

As pointed out above, none of the claims pursued by SUWA in the preliminary injunction proceedings was "general" or "programmatic" in nature. Rather, SUWA challenged BLM's failure to take a specific action or meet a

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[9] ORV Intervenors' suggestion that SUWA could challenge individual trail closure decisions, ORV Pet. at 19, ignores the fact that this case challenges BLM's failure to impose just such restrictions. Furthermore, the fact that BLM has taken *some* final actions concerning ORV use somewhere in Utah – mostly in response to this lawsuit – does not mean that SUWA can pursue its nonimpairment claims through 5 U.S.C. § 706(2)(A) challenges to final agency action, as the ORV Intervenors assume. In a challenge to the adequacy of a discrete ORV closure in one corner of Utah, SUWA could not argue that the closure violates the law because it fails to adequately protect WSAs in another corner of the State.

specific legal requirement in a specific area. *See supra* at 14-16. Because none of these claims presents a "programmatic challenge" or involves "general" statutory duties, BLM's concerns with judicial review of such claims cannot justify Supreme Court consideration.

Nor does this case give rise to BLM's second concern: whether a court may hear a challenge to an agency's failure to take non-final action.[10] In its motion for preliminary injunction, SUWA asked the court to order BLM to close several WSAs to ORV travel in order to prevent the impairment of the areas in violation of 43 U.S.C. § 1782(c). This Court has explicitly recognized that such road closure decisions are final agency actions subject to APA challenge. *Ohio Forestry*, 523 U.S. at 738-39; *see also Mausolf v. Babbitt*, 125 F.3d 661, 669-70 (8th Cir. 1997); BLM App. at 18a n.10 (describing other final actions that BLM might take to prevent impairment).

BLM's assertion that SUWA is seeking to compel non-final agency action through its land use plan consistency claim is likewise unavailing.[11] BLM is simply wrong when it relies upon *Ohio Forestry* for the proposition that all land use plan provisions, including those invoked by SUWA in this case, are merely "antecedent … planning activities" that do not "create any legal rights or obligations." BLM Pet. at 23-24. In fact, while this Court held in *Ohio Forestry* that a challenge to the logging allowed by a particular forest plan was not ripe for review because no trees could be cut until a

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[10] BLM does not argue that there is a circuit split concerning whether a court may compel non-final action. Indeed, the agency fails to provide a single citation to case authority from any level that holds that only "final" action may be compelled.

[11] Since the filing of this lawsuit, BLM has begun to comply with the two management commitments whose performance SUWA sought to compel in this case. *See supra* at 6 n.2.

second stage of decision-making had taken place, *Ohio Forestry*, 523 U.S. at 732-37, this Court recognized that forest plans do make some decisions that have an immediate impact and that those decisions may be challenged immediately, *id.* at 738-39.

The land use plan decisions at issue here are just the sort of final actions recognized in *Ohio Forestry*. Contrary to BLM's assertion that the San Rafael Route Designation Plan would not "alter the legal regime … in any respect concerning off-road vehicle use," BLM Pet. at 23 (quoting *Ohio Forestry*, 523 U.S. at 733), the route designation decisions made in that document determine which routes will be closed and which will be open to ORV use by the public. *See* http://www.ut.blm.gov/sanrafaelohv/wthedecision.htm (announcing that the route designation decision leaves 677 miles of vehicle routes open to ORVs and closes 468 miles to ORVs). Such route closure orders are explicitly mentioned in *Ohio Forestry* as the sort of planning decision that may be challenged immediately. *Ohio Forestry*, 523 U.S. at 738-39.[12] Indeed, the government itself admitted in its briefing and again at oral argument in *Ohio Forestry* that road closure decisions made in plans may be challenged immediately. *Id.* at 739.[13]

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[12] The San Rafael Route Designation Plan is, in fact, the subject of several pending challenges by ORV advocates before the Interior Board of Land Appeals. *See Huck v. BLM*, IBLA No. 2003-169; *Telepak v. BLM*, IBLA No. 2003-170; *Norton v. BLM*, IBLA No. 2003-171; *Southeastern Utah OHV Club v. BLM*, IBLA No. 2003-172.

[13] BLM also seeks review on the basis of its belief that FLPMA's plan consistency provision requires only that independent future projects approved by the agency be consistent with the applicable land use plan and that BLM need not comply with specific affirmative management commitments made by the agency in its plans. BLM Pet. at 24. This argument goes to the

BLM's concern that SUWA seeks to compel non-final agency action in its supplemental NEPA claim is similarly misplaced. BLM is simply incorrect when it asserts that the NEPA decision document sought by SUWA is not a final agency action. BLM Pet. at 21. An agency's decision whether or not it will prepare a supplemental NEPA document marks the end of that decision-making process and, as such, has always been treated by this Court and others as a final and challengeable action. *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360 (1989); *South Trenton Residents Against 29 v. Federal Highway Admin.*, 176 F.3d 658, 662-64 (3rd Cir. 1999); *Hughes River*, 81 F.3d at 442-46; *Village of Grand View v. Skinner*, 947 F.2d 651, 657 (2d Cir. 1991).[14] There is no circuit split or other reason to

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merits of SUWA's claims and has nothing to do with subject matter jurisdiction. In any case, the Tenth Circuit rightly rejected BLM's argument as contrary to the "simpl[e] and straightforward[]" terms of FLPMA and its regulations. BLM App. at 29a. 43 C.F.R. § 1610.5-3(a) states that *"[a]ll future resource management* authorizations and *actions . . . shall* conform to the approved plan." (Emphasis added.) Because the 1990 Henry Mountains ORV Implementation Plan declares that BLM will conduct intensive monitoring at Factory Butte, the only way that BLM can "conform" its management actions to this provision is to do the promised monitoring. By the same token, because the 1991 San Rafael Resource Management Plan decides that BLM will limit ORV use to designated trails in the San Rafael area, the agency can "conform" its actions to the plan only by following through with the trail designations.

[14] BLM's claim that SUWA's supplemental NEPA challenge is not related to any final agency action also ignores the ongoing impact of decisions made in the land use plans at issue in this case. Based on the NEPA analyses that accompanied the adoption of the land use plans, those plans provided that millions of acres would be open to unrestricted ORV use. The impacts of those decisions are not limited to the moment the plans were adopted, but rather are felt throughout the life of the plans. Thus, far from being

justify reviewing this consistent treatment of supplemental NEPA claims.[15]

IV. The Tenth Circuit's Decision To Allow SUWA's Unexceptional APA Claims To Proceed Is Consistent With The Treatment Of Such Claims By Other Courts.

Section 706(1) empowers courts to compel federal agencies to comply with mandatory statutory duties. FLPMA unquestionably imposes such a duty by mandating that BLM "shall" manage WSAs "in a manner so as not to impair the suitability of such areas for preservation as wilderness." 43 U.S.C. § 1782(c). *See Bennett v. Spear*, 520 U.S. 154, 175 (1997) ("any contention that the relevant provision of [law] . . . is discretionary would fly in the face of its text, which uses the imperative 'shall'").

It is well settled that § 706(1) may be used to compel an agency to exercise its discretion when the exercise of that discretion is statutorily required. For example, in the 1947 Attorney General's Manual on the APA, the authors noted in their discussion of § 706(1) that "a court may require an agency to take action upon a matter, without directing how it

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"divorced from" any major federal action, as BLM claims (BLM Pet. at 22), SUWA's supplemental NEPA claim is tied to the effects of major federal actions that are still having significant ongoing environmental impacts.

[15] BLM also objects that SUWA's supplemental NEPA claim could "intrude" upon BLM's planning activities, thereby diverting its resources "from the activities chosen by the agency." BLM Pet. at 10, 28. If anything, this argument goes to the merits or relief for the NEPA claim; it has nothing to do with a court's authority under the APA. Moreover, if jurisdiction over failure-to-act claims turned on whether an agency would choose to focus on other activities, jurisdiction would never exist because failure-to-act claims, by definition, involve an agency that has chosen to ignore its statutory duty and spend its resources elsewhere.

shall act." Attorney General's Manual on the Administrative Procedure Act, at 108 (1947). SUWA's nonimpairment claim fits this "mandatory-exercise-of-discretion" paradigm perfectly; SUWA asked the district court to compel BLM to exercise its management discretion so as to satisfy the agency's mandatory duty under FLPMA to prevent the impairment of four specific WSAs. [16]

The unexceptional nature of SUWA's nonimpairment claim is underscored by the many analogous cases in which courts have considered inaction claims under the APA. For example, in *NAACP v. Secretary of Housing and Urban Development*, 817 F.2d 149 (1st Cir. 1987), then-Judge Breyer held that HUD's failure to comply with its ongoing statutory obligation to "administer the programs and activities relating to housing and urban development in a manner affirmatively to further the policies" set forth in the Fair Housing Act was subject to judicial review under § 706(1). *Id.* at 151, 160. In doing so, Judge Breyer concluded that the APA's "broad presumption in favor of judicial review of agency action" is not overcome by the agency's discretion concerning precisely how to discharge its

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[16] BLM asserts that SUWA's claims should be rejected because doing so will force the public to first petition BLM for a change in land management under 5 U.S.C. § 553(e), thus affording agencies the opportunity to make a final challengeable decision regarding the public's concerns. BLM Pet. at 18. This argument suffers from many flaws. First, SUWA did, in fact, request that BLM comply with its statutory duties to restrict ORV in many of the areas at issue here. *See* text *supra* at 6-7. This case arose when BLM failed to respond. Second, quite apart from § 553(e)'s rulemaking procedure, the APA specifically provides for challenges to agency inaction. *See* 5 U.S.C. § 551(13) (challengeable "agency action" includes the "failure to act"). Third, § 553(e) applies only to petitions for new rules and has nothing to do with forcing an agency to comply with existing law and regulation, as SUWA is seeking to do in this case.

legal duties. *Id.* at 157 (quoting *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140-41 (1967)).

The principle that a plaintiff may challenge an agency's failure to comply with a statutory duty that involves the exercise of agency discretion has been recognized by appellate courts across the nation. *See Darst-Webbe Tenant Ass'n Bd. v. St. Louis Housing Auth.*, 339 F.3d 702, 712-14 (8th Cir. 2003); *Public Citizen Health Research Group v. Commissioner, Food & Drug Admin.*, 740 F.2d 21, 32-35 (D.C. Cir. 1984); *Center for Biological Diversity v. Veneman*, 335 F.3d 849, 853-57 (9th Cir. 2003) (court has the power under 5 U.S.C. § 706(1) to compel Forest Service to comply with duty to consider the effects of its planning decisions on 57 identified rivers); *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1190 (10th Cir. 1999) (compelling the Fish and Wildlife Service under § 706(1) to designate Endangered Species Act "critical habitat" even though the designation decision involves an exercise of discretion and agency expertise); *Iowa ex rel. Miller v. Block*, 771 F.2d 347, 349-52 (8th Cir. 1985) (permitting review under APA of Secretary of Agriculture's failure to implement disaster relief programs); *Adams v. Richardson*, 480 F.2d 1159, 1161-63 (D.C. Cir. 1973) (upholding action against HEW under APA for failure to enforce antidiscrimination provisions of Title VI).

The Ninth Circuit reached the same conclusion in *Montana Wilderness Ass'n v. United States Forest Service*, 314 F.3d 1146 (9th Cir. 2003), in which the court affirmed the district court's authority to decide whether the Forest Service violated a comparable nonimpairment duty in its management of WSAs in Montana. In that case, the government argued, as it does here, that the courts may not hear a challenge under § 706(1) to the agency's failure to satisfy this mandatory duty because the statute does not prescribe the precise manner in which the Forest Service is to satisfy this nonimpairment requirement. *Id.* at 1151. Judge

Trott, writing for a unanimous panel, rejected the government's characterization of the nonimpairment requirement as a "general" statutory duty and instead concluded that it:

> establishes a management directive requiring the Forest Service to administer the Study Areas to "maintain" wilderness character and potential for inclusion in the Wilderness System. . . . *[T]he Forest Service's duty to maintain wilderness character and potential is a nondiscretionary, mandatory duty that it may be compelled to carry out under section 706(1).*

Montana Wilderness, 314 F.3d at 1151 (emphasis added).

As these cases demonstrate, Congress often imposes a mandatory duty to achieve or avoid some end without saying exactly how the agency must satisfy that mandate. These mandatory duties are as binding and justiciable under the APA as any others.[17] Contrary to BLM's suggestion, treating them as such is in no way contrary to the mandamus principles from which it claims § 706(1) was derived. BLM Pet. at 15-17. Courts may issue writs of mandamus even if a statute leaves an agency with some discretion about how to

[17] BLM warns darkly that such inaction claims will "almost inevitably" require a court to substitute its judgment for an agency on a "grand scale." BLM Pet. at 17. The agency's fear is unwarranted. The court's role in assessing such inaction claims is simply to determine whether, in fact, the agency is meeting the statutory requirement (in this case, preventing the impairment of the specific WSAs), and, if necessary, to fashion appropriate injunctive relief. Far from "significantly disrupt[ing]" public lands management, BLM Pet. at 27, the public would be forcing BLM to manage those lands in keeping with Congress's command. This is exactly the role that the APA's review provisions are meant to allow the courts to play.

satisfy a mandatory requirement. As this Court has recognized, mandamus may be used "to compel action, when refused, *in matters involving judgment and discretion . . . .*" *Wilbur v. United States ex rel. Kadrie*, 281 U.S. 206, 218 (1930) (emphasis added). *See also Idaho Watersheds Project v. Hahn*, 307 F.3d 815, 832 (9th Cir. 2002) ("While it is true that the writ of mandamus is chiefly used to compel the performance of a ministerial duty, '[i]t also is employed to compel action, when refused, in matters involving judgment and discretion, but not to direct the exercise of judgment or discretion'") (quoting *Miguel v. McCarl*, 291 U.S. 442, 451 (1934)); *Marquez-Ramos v. Reno*, 69 F.3d 477, 479 (10th Cir. 1995) ("*even in an area generally left to agency discretion*, there may well exist statutory or regulatory standards delimiting the scope or manner in which such discretion can be exercised. In these situations, *mandamus will lie when the standards have been ignored or violated*") (quoting *Carpet, Linoleum & Resilient Tile Layers v. Brown*, 656 F.2d 564, 566 (10th Cir. 1981)) (emphasis added); *Flynn v. Schultz*, 748 F.2d 1186, 1194 (7th Cir. 1984); *Davis Assocs., Inc. v. Secretary, Dep't of Hous. & Urban Dev.*, 498 F.2d 385, 389 & n.5 (1st Cir. 1974); *Edgerton v. Kingsland*, 168 F.2d 128, 130 (D.C. Cir. 1947).

This is exactly the case here. Congress imposed a nonimpairment requirement in FLPMA. While FLPMA may leave BLM with discretion regarding how to satisfy this mandate in particular situations, the statute unquestionably removes BLM's discretion to permit impairment. The Tenth Circuit's conclusion that the district court had the authority to review BLM's compliance with the nonimpairment mandate does not warrant Supreme Court review.

CONCLUSION

The Petitions for a Writ of Certiorari should be denied.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

SOUTHERN UTAH WILDERNESS ALLIANCE a Utah non-profit corporation, THE WILDERNESS SOCIETY, a national non-profit corporation, THE SIERRA CLUB, a California non-profit corporation, THE GREAT OLD BROADS FOR WILDERNESS, a Utah non-profit corporation, WILDLANDS CPR, a Montana non-profit corporation, UTAH COUNCIL OF TROUT	*	Case No. 2:99CV 852 K Judge Kimball Magistrate Boyce **SECOND AMENDED COMPLAINT**

UNLIMITED, a Utah non-profit organization, AMERICAN LANDS ALLIANCE, a national non-profit corporation, and THE FRIENDS OF THE ABAJOS, a Utah non-profit corporation,

Plaintiffs,

vs.

BRUCE BABBITT, United States Department of Interior in his capacity as Secretary of Interior, TOM FRY, Director, Bureau of Land Management, and THE BUREAU OF LAND MANAGEMENT,

Defendants,

and

UTAH SHARED ACCESS ALLIANCE, a Utah non-profit corporation, BLUE RIBBON COALITION, an Idaho non-profit corporation, ELITE MOTORCYCLE TOURS, a Utah corporation, and ANTHONY CHATTERLY,

Defendants-Intervenors.

Plaintiffs SOUTHERN UTAH WILDERNESS ALLIANCE, a Utah non-profit corporation, THE WILDERNESS SOCIETY, a national non-profit corporation, THE SIERRA CLUB, a California non-profit corporation, THE GREAT OLD BROADS FOR WILDERNESS, a Utah non-profit corporation, THE WILDLANDS CENTER FOR PREVENTING ROADS, a Montana non-profit corporation, UTAH COUNCIL OF TROUT UNLIMITED, a Utah non-profit corporation, AMERICAN LANDS ALLIANCE, a national non-profit corporation, and the FRIENDS OF THE ABAJOS, a Utah non-profit corporation, as a complaint and cause of action against the defendants BUREAU OF LAND MANAGEMENT ("BLM"), Secretary of Interior BRUCE BABBITT ("the Secretary"), and BLM Acting Director TOM FRY, allege as follows:

INTRODUCTION

1. This suit challenges BLM's failure to control one of the most significant threats to the environmental health of Utah's public lands: unregulated off-road vehicle ("ORV") use. BLM is obligated by Executive Orders and its own regulations to, among other things, minimize the effects of ORVs on public land resources; to designate trails and inform the public where ORVs may and may not travel; and to monitor the impacts of ORV use. BLM has neglected these responsibilities, and as a direct result of that failure, irresponsible ORV use continues to irreparably damage Utah's most spectacular public lands, including designated wilderness study areas and areas that are eligible for wilderness designation in the future.

JURISDICTION AND VENUE

2. This court has jurisdiction over this action pursuant to the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 et seq., the Federal Land Policy

Management Act ("FLPMA"), 43 U.S.C. § 1701 et seq., the Declaratory Judgment Act, 28 U.S.C. § 2201, the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 et seq, and federal question, 28 U.S.C. § 1331.

3. Injunctive relief is authorized by Rule 65 of the Federal Rules of Civil Procedure.

4. Venue is proper in the Central Division of the United States District Court for the District of Utah pursuant to 28 U.S.C. § 1391(e) because the statutory violations alleged herein all occurred within the state of Utah.

PARTIES

5. Plaintiff SOUTHERN UTAH WILDERNESS ALLIANCE ("SUWA") is a non-profit corporation dedicated to the sensible management of all public lands within the State of Utah, to the preservation and protection of plant and animal species, and to the preservation of Utah's remaining wild and undeveloped lands. SUWA has more than 18,000 members, many of whom reside in Utah. SUWA members and staff use and enjoy BLM lands in and throughout Utah for a variety of purposes, including scientific study, recreation, and aesthetic appreciation. Furthermore, SUWA members and staff have a substantial interest in this matter -- they have, and will continue to suffer real and immediate harm as Utah's remaining wild lands are significantly impaired by unrestricted ORV abuse, as alleged below. SUWA is also a charter member of the Utah Wilderness Coalition ("UWC"), a coalition of 160 local and national organizations dedicated to the passage of America's Redrock Wilderness Bill. SUWA brings this action on its own behalf and on behalf of its adversely affected members.

6. Plaintiff THE WILDERNESS SOCIETY ("TWS") is a non-profit national membership organization

founded in 1935 and devoted to preserving wilderness and wildlife on our public lands, and fostering an American land ethic. The Wilderness Society is particularly focused on ensuring that remaining roadless lands are managed to preserve their wild character -- free from roadbuilding, logging, mining, off-road vehicle use, and other development -- and on protecting additional lands as designated wilderness. The Wilderness Society has 188,000 members nationwide, approximately 1,224 of whom reside in Utah. Nationally, many of TWS' members use Utah BLM lands for business and recreation. TWS is also a charter member of the UWC, a coalition of 160 local and national organizations dedicated to the passage of America's Redrock Wilderness Bill. TWS members suffer direct harm by the unregulated use of ORVs in some of Utah's most fragile and stunning lands.

7. Plaintiff THE SIERRA CLUB is a non-profit corporation with its principal place of business in San Francisco, California. The Sierra Club is a national conservation organization with a membership of approximately 560,000. The Utah Chapter is the Utah division of the Sierra Club and has over 6000 members. The Sierra Club's purposes include protecting and enhancing by all lawful means the natural resources and human environment of the United States and the earth, and to explore, enjoy, and preserve those resources. Specifically, the Sierra Club's purposes include advocating responsible management of public lands resources in the state of Utah, and the Utah Chapter has a long history of public education and advocacy to protect such resources. The Sierra Club is also a charter member of the UWC, a coalition of 160 local and national organizations dedicated to the passage of America's Redrock Wilderness Bill. Sierra Club members who use and enjoy the areas described in this complaint as suffering damage from ORVs are directly injured by such damage.

8. Plaintiff THE GREAT OLD BROADS FOR WILDERNESS ("Great Old Broads") is a non-profit corporation with over 1,600 members nation-wide, many of whom reside in Utah. Great Old Broads supports the inclusion of America's threatened wild lands into the National Wilderness Preservation System. In addition, Great Old Broads was formed to protect the interests of senior populations who enjoy access to roadless areas without mechanized means of transportation and its associated impacts on the environment. Many of Great Old Broad's members travel to Southern Utah annually to hike, camp, fish, paint, and photograph. The Great Old Broads is also a member of the UWC, a coalition of 160 local and national organizations dedicated to the passage of America's Redrock Wilderness Bill. Great Old Broad's members suffer actual and immediate harm by rampant and uncontrolled ORV use in some of Utah's most fragile and spectacular lands.

9. Plaintiff WILDLANDS CENTER FOR PREVENTING ROADS ("Wildlands CPR") is a non-profit organization whose mission is to revive and protect the natural, undeveloped character of public lands by promoting appropriate road removal and revegetation, preventing inappropriate and environmentally destructive road construction, and regulating motorized recreation where necessary to protect the environment. Wildlands CPR is a national clearinghouse and network, providing citizens with tools and strategies to promote sensible, but not excessive, transportation routes. Wildlands CPR works with over 450 members nationwide, and has 23 members and affiliated organizations in Utah. Almost half of its Utah members are non-profit organizations, and many of their members visit and recreate throughout Utah BLM lands. Wildlands CPR's members are suffering real and immediate harm as a result of unregulated ORV use and abuse throughout these lands.

10. Plaintiff the UTAH COUNCIL OF TROUT UNLIMITED ("Trout Unlimited") is a non-profit organization whose mission is to preserve, protect, and restore Utah's cold water fisheries and their watersheds. The Utah Council represents eight local Utah Trout Unlimited chapters and has more than 1,200 members, most of whom reside in Utah. Trout Unlimited's members use and enjoy Utah's BLM lands for a variety of purposes, but chiefly to fish and enjoy access to Utah's spectacular trout fishing. Trout Unlimited's members suffer real and actual harm by uncontrolled and irresponsible ORV use in some of Utah's fragile wetland and riparian areas.

11. Plaintiff AMERICAN LANDS ALLIANCE is a national non-profit corporation committed to participating in and educating the public about Utah public lands issues, including ORV use and abuse on BLM lands. American Lands Alliance represents and serves grassroots environmental groups nationwide and reaches more than 2,500 activists, many of whom reside in Utah. American Lands Alliance staff, and members use and enjoy Utah's BLM lands, for a number of purposes, including hiking, birding, fishing, and enjoying peaceful solitude. These people are suffering real and immediate harm from uncontrolled ORV abuses on BLM lands.

12. Plaintiff FRIENDS OF THE ABAJOS is a non-profit organization dedicated to the preservation and restoration of fully functioning natural ecosystems and native species in southeastern Utah's canyon country. Friends of the Abajos has more than twenty members, many of whom reside in Utah. The organization is particularly concerned that the explosion of ORV use in southeastern Utah is greatly impacting the integrity of Utah BLM lands, and it seeks to limit ORV access, funding, and impacts to an amount that equals their percentage of the total public lands user population. Friends of the Abajos members use Utah BLM

lands for hiking, biking, scientific study, birding, and to enjoy peaceful solitude. Its members are suffering a significantly diminished experience on these same lands because of the rapid expansion of user created trails and ORV impacts, including noise, scarring of the landscape, and harassment of wildlife.

13. Defendant BLM is the agency within the U.S. Department of Interior directly responsible for carrying out the Department's obligations under statutes, regulations, and Executive Orders governing ORV use. BLM manages approximately 23 million acres of public lands in Utah.

14. Defendant Bruce Babbitt is the Secretary of the United States Department of Interior, and, among other things is charged with overseeing the management of the nation's BLM lands. The Secretary is further charged with implementing statutes, regulations, and Executive Orders 11644 and 11989 on the lands within his control.

15. Defendant Tom Fry is the acting Director of the Bureau of Land Management, and in that role is charged with the duty of the management of the nation's BLM lands.

BACKGROUND FACTS

A. ORV DAMAGE TO PUBLIC RESOURCES

16. Off-road vehicle or "ORV" is the generic term used to describe motorized vehicles equipped for travel off of improved and maintained roads. Such vehicles include high-clearance jeeps and trucks, cross-country motorcycles, dune buggies, and all-terrain vehicles or "ATVs." When used in areas that cannot sustain their impacts, ORVs cause damage to soils and vegetation; harm to wildlife and wildlife habitat; degradation of both water quality and riparian health; and serious harm to cultural resources. Uncontrolled

ORV use also causes significant conflicts among public land users, as well as the significant impairment of the wilderness qualities of Utah's public lands.

Harm to Soils

17. Fragile soils are damaged by unregulated ORV abuse, and even the single pass of an ORV on sensitive soils, like those found throughout Utah, can cause permanent damage. Soil disruption and soil compaction are among the most readily identified results of ORV travel. Soil disruption includes such things as increased wind and water erosion, decreased soil stability, and destruction of organic crusts. Soil compaction generally refers to increasing soil density and impermeability directly resulting from ORV travel.

18. In some instances ORV use causes the complete removal of soil down to the bedrock layer. Soil erosion is exacerbated when wind or rain strikes a denuded slope, and the soil migrates downslope or is moved large distances by strong winds. In many of Utah's most spectacular lands, including wilderness study areas (WSAs) in the San Rafael Swell evidence of soil erosion is commonplace and widespread. ORV caused soil erosion also degrades water and air quality.

Harm to Vegetation

19. ORVs have significantly impacted Utah's vegetation, in part as a result of the widespread erosion discussed above. These impacts range from the destruction of fragile cryptobiotic crusts, to the wholesale loss of annual and perennial species, as well as damage to mature trees. Ultimately, web-like networks of ORV trails may coalesce into broad areas largely denuded of vegetation. Such impacts are easily seen in place like Behind the Rocks and Sids Mountain wilderness study areas ("WSAs").

20. When taken cross-country or off established routes, ORVs cause significant damage to cryptobiotic crusts which are critical to many plant communities. These crusts are critical to ecosystem health and are largely responsible for maintaining soil stability, retaining critical moisture, reducing wind erosion, and for increasing soil fertility. Studies have documented that even a single pass by an ORV is sufficient to destroy these crusts, and that recurrent ORV travel causes substantial harm. Such harm is evident, among other places, throughout Indian Creek WSA and Utah's fragile Cedar Mesa where denuded landscapes have become a commonplace occurrence.

Harm to Wildlife

21. Numerous studies have documented both direct and indirect ORV caused harm to wildlife. ORV use frequently leads to reduced density and diversity of small mammal populations, through both through direct mortality and loss of critical habitat. For example, cross-country travel crushes the burrows and other shelters that are critical for desert species to seek shelter from daytime heat.

22. Additionally, while on their wintering range, elk and mule deer are particularly susceptible to ORV disturbances. Despite this identified increased risk, current ORV classifications in the places like the Book Cliffs permit unfettered ORV travel through such areas.

Harm to Water Quality

23. ORVs have both direct and indirect negative impacts on Utah's water quality. ORV use in and near stream and riparian systems results in increased turbidity, increased stream temperature, and increased sedimentation. For example, a popular ORV trail in Arch Canyon crosses

Arch Creek over 55 times in seven miles, resulting in increased sedimentation, eroding streambanks, and a reduction in riparian plants.

Harm to Cultural Resources

24. Numerous studies have concluded that the proximity of archeological sites to motorized vehicle access routes is directly correlated to the level of looting or vandalism these sites receive.

25. In Utah, there have been numerous cases in which ORVs have run over archaeological sites, or enhanced access that has, in turn, led to vandalism. For example, pothunters traveling throughout Cedar Mesa on ORVs have vandalized cultural resources.

Increased User Conflicts

26. ORV use has been shown to displace other non-motorized trail users, and studies have even shown that other mechanized trail users (i.e., mountain bikes) are less likely to visit an area with widespread ORV use.

27. ORV and non-motorized conflicts are widely evident throughout Utah's BLM lands. For example, BLM's Price field office's own documents show that it has received numerous letters from non-motorized visitors to the San Rafael Swell detailing "run-ins" with ORV users. These encounters have ranged from finding recent resource destruction, to disputes with ORV users.

Wilderness Suitability

28. As BLM's own reports show, ORVs have caused, and continue to cause, significant impairment to WSAs, as well as lands recognized by both the BLM and the

Utah Wilderness Coalition as having wilderness characteristics. While BLM's internal guidance permits ORVs to travel pre-existing routes within WSAs, ORV users do not remain on these trails but instead frequently travel cross-country and create additional new routes causing damage similar to that described above.

29. For example, ORVs legally access WSAs such as Parunuweap, Crack Canyon, Sids Mountain, and San Rafael Reef through "existing" trails, but ORVs then proceed to travel off-route and cause significant harm to wilderness resources, including destruction of cryptobiotic soil, soil erosion, and permanent, lasting scars to the landscape. Thus, these WSAs and numerous others are suffering significant damage from ORVs, in some cases, to such a level that their suitability for wilderness designation is threatened.

30. BLM's original wilderness inventory pursuant to Section 603 of FLPMA was completed in 1980. In 1999, BLM conducted a supplemental wilderness inventory of the public lands it manages in Utah ("the 1999 Inventory"). The 1999 Inventory identified an additional 2.6 million acres of BLM lands with wilderness characteristics. Although they have the scenic and other qualities necessary for wilderness protection, these areas remain largely open to unrestricted ORV travel.

31. Some of the lands within BLM's 1999 Inventory are threatened by sustained ORV damage, to the point that their future designation as congressionally designated wilderness may be jeopardized.

32. Finally, the Utah Wilderness Coalition has identified 3.3 million acres of BLM lands in addition to existing WSAs and those lands identified in BLM's 1999 Inventory as having wilderness characteristics. Some of these lands are primarily located in areas classified as "open"

to unrestricted ORV travel, and their continuing eligibility for wilderness designation is threatened by significant resource degradation from ORV use.

B. LEGAL FRAMEWORK FOR MANAGEMENT OF ORVS ON PUBLIC LANDS

33. In 1972 President Nixon issued Executive Order 11644, which imposed a number of specific and non-discretionary duties on the Secretary to control and minimize the effects of ORV use. These duties include: classifying all BLM lands as either "open," "closed," or "limited" to ORV travel; designating trails for ORV use in limited areas; marking areas and trails and providing the public with maps depicting such classifications and designations; minimizing the effects of ORV use on specifically identified natural resources; and monitoring ORV impacts throughout BLM lands.

34. In 1978, President Carter issued Executive Order 11989, which amended Executive Order 11644, and gave federal agencies additional direction and authority to control ORV use. Executive Order 11989 empowered federal agencies to adopt a "closed, unless signed open" policy, and also to immediately close areas suffering from ORV damage. The Executive Orders were enacted in furtherance of NEPA, and are found in note following 42 U.S.C. § 4321.

35. In 1979, the BLM issued its off-road vehicle regulations, 43 C.F.R. §§ 8340-42. These regulations further implement, and largely restate, the planning, informational, and monitoring requirements of the Executive Orders.

C. UTAH BLM'S FAILURE TO IMPLEMENT THE EXECUTIVE ORDERS AND BLM REGULATIONS

36. The Utah BLM State Office is located in Salt Lake City, Utah, with eleven field offices throughout Utah. These field offices are in: Salt Lake City, Fillmore, Richfield, Vernal, Price, Moab, Monticello, Kanab, St. George, Grand Staircase-Escalante, and Cedar City. Each field office is comprised of former Resource Areas and/or Planning Units, and, with the exception of the St. George field office, each office is guided by Resource Management Plans (RMPs) and Management Framework Plans (MFPs) that reference earlier planning designations.

37. On May 18, 1998, SUWA filed a Freedom of Information Act ("FOIA") request pertaining to ORV use on BLM lands with the Utah BLM State Office. (Attached as Exhibit A). SUWA's comprehensive FOIA request sought information on all aspects of Utah BLM's ORV management, including the agency's compliance with the Executive Orders and BLM's own regulations. After BLM's initial refusal to provide the documents, nearly a year later SUWA received both a complete set of the requested information as well as notices from every Utah field office stating that the particular office had fully complied with SUWA's FOIA request. (Attached as Exhibit B). Field office responses to SUWA's FOIA were compiled in individual offices and then sent to the State Office for distribution to SUWA.

38. All of Utah's BLM lands have been classified in MFPs, RMPs, or plan amendments as either "open," "limited," or "closed" to ORV travel.

39. An "open" designation permits ORVs to travel anywhere within that area, with no restrictions. Every

Utah field office has lands designated as "open" to cross-country ORV travel. For example, the Mountain Valley Planning Unit (Richfield Field Office) and the Pinyon Planning Unit (Cedar City District Office) are in effect entirely open to cross-country ORV travel, with only a handful of unsigned and unidentified limitations or closures.

40. Additionally, all Utah BLM Field Offices have some lands classified as "limited" to ORV travel. Generally, these limitations restrict ORVs to either "existing" or "designated" routes and trails, as well as seasonal wildlife restrictions.

41. Although many "limited" areas restrict ORV use to "existing" routes and trails, there is no way to ascertain the routes to which ORVs are restricted because the Utah field offices failed to inventory the existing trail networks when the various planning documents were created. As a result of that failure, areas classified as "limited" have suffered a broad expansion of the "existing" trail network without the necessary public input required in BLM's regulations. In fact, there is no map indicating the existing trail network in any Utah field office.

42. BLM law enforcement is unable to enforce "limited" classifications without actual "designations" being published in the Federal Register. Absent these designations, a "limited" classification is in practical and legal effect the same as an "open" classification. As a result of this fact, 94% of Utah BLM lands remain, as a practical matter, open for unrestricted ORV use.

43. Although specifically charged to "monitor the effects of the use of [ORVs]," Utah BLM has with limited exceptions not engaged in such monitoring. In particular, with the exception of the Mountain Valley Planning Unit and sporadic, anecdotal monitoring in existing WSAs, the BLM

has no documentation of any monitoring of ORV use or impacts.

44. Because BLM has failed to monitor ORV use, it cannot and does not know, whether the current classifications "minimize" ORV impacts, as directed by the Executive Orders and its own regulations.

45. In each of the land use planning documents in which BLM classified its lands for ORV use, the agency made specific commitments regarding future actions that would be taken to minimize and regulate the impacts of ORV use. These commitments include: the preparation of more detailed ORV management or travel plans, the preparation of maps and other informational materials for distribution to the public, the creation of monitoring plans and protocols for such monitoring, and the marking and signing of designated trails. With respect to each of the land use planning documents, one or more, and sometimes all of these commitments has not been carried out.

46. Of particular importance to plaintiffs, BLM's failure to adequately control ORV use has resulted in actual, documented harm to existing WSAs, as well as areas identified by the Utah Wilderness Coalition and the BLM as having wilderness characteristics. For instance, in Parunuweap and Canaan Mountain WSAs, repeated ORV abuses have left lasting scars that may prevent these units from being congressionally designated Wilderness. In addition, ORV abuses have escalated to the point that lands identified by UWC as having wilderness characteristics have been entirely removed from consideration.

First Cause of Action

Failure to Designate Trails
(Executive Order 11644 §3 and 43 C.F.R. §8342.1)

47. The allegations of paragraphs 1-46 are incorporated herein by reference.

48. Section 3 of Executive Order 11644 provides that the Secretary "shall designate" trails where off-road vehicle use is impermissible, as well as designating trails where such use is allowed. 43 C.F.R. § 8342.1 also provides that BLM shall designate areas and trails where ORV use is permissible and impermissible.

49. Every Utah BLM has failed to comply with the Executive Orders and regulations and designate trails available for ORV use.

50. Utah BLM undertook to comply with these regulations with respect to "limited" areas by committing in land use planning documents to undertake designation of trails on which ORV use would be permitted. Not a single Utah BLM field office has completed its trail designations in areas identified as "limited" in the relevant land use planning document. Accordingly, BLM has violated Executive Order 11644 § 3(a) and 43 C.F.R. § 8342.1, and section 706(1) of the APA, 5 U.S.C. § 706(1).

Second Cause of Action

Failure to Mark Designated Areas and Trails
(Executive Order 11644 §5 and 43 C.F.R. § 8342.2)

51. The allegations contained in Paragraphs 1-50 are incorporated herein by reference.

52. Section 5 of Executive Order 11644 directs the Secretary to "ensure that areas and trails where off-road vehicle use is permitted are well marked and [to] provide for the publication and distribution of information, including

maps, describing such areas and trails and explaining the conditions of vehicle use."

53. 43 C.F.R. § 8342.2(c) requires BLM to mark and take other appropriate measures to identify areas and trails so that the public will be aware of locations and limitations thereto." BLM must prepare "appropriate informational materials, including maps, available for public review." The agency must also publish its trail designations in the Federal Register. See id., see also 43 C.F.R. § 1610.5-1(b).

54. Every Utah BLM field office has failed to accurately mark and sign most of the areas and trails lawfully available for ORV use. In addition, all Utah BLM field offices have failed to prepare maps identifying trails lawfully open for ORV use. Accordingly, BLM has violated Executive Order 11644 § 5 and 43 C.F.R. § 8342.2(c), and section 706(1) of the APA, 5 U.S.C. § 706(1).

Third Cause of Action

Failure to Monitor ORV Impacts
(Executive Order 11644 §8 and 43 C.F.R. § 8342.3)

55. The allegations of paragraphs 1-54 are incorporated herein by reference.

56. Section 8 of Executive Order 11644 directs the Secretary to monitor "the effects of the use of [ORVs]" and to change ORV designations whenever the minimization criteria in Section 3 are not met.

57. 43 C.F.R. §8342.3 specifically charges BLM to monitor the "effects of the use of off-road vehicles." Based upon that information, BLM may amend, revise, revoke, or take other actions to ensure that it is complying

with the Executive Orders and its own regulations. See id.

58. Every Utah BLM field office, with the exception of the Mountain Valley Planning Unit, has failed to monitor ORV impacts on lands outside of WSAs. Accordingly, BLM has violated Executive Order 11644 § 8(a) and 43 C.F.R. § 8342.3, and section 706(1) of the APA, 5 U.S.C. § 706(1).

Fourth Cause of Action

Failure to Ensure Public Participation in Trail Designation
(Executive Order 11644 §3 and 43 C.F.R. § 8342.2)

59. The allegations contained in paragraphs 1-58 are incorporated by reference herein.

60. Section 3 of Executive Order 11644 provides that the BLM "shall ensure adequate opportunity for public participation in the . . . designation of areas and trails."

61. 43 C.F.R. § 8342.2(a) states that the "designation [of] trails . . . is accomplished through the resource management planning process described in [43 C.F.R. § 1600]. . . . Prior to making designations . . . the authorized officer shall consult with interested user groups, Federal, State, county and local agencies, local landowners, and other parties in a manner that provides an opportunity for the public to express itself and have its views given consideration."

62. Every Utah BLM field office has permitted the creation of ORV "user trails" -- created solely by the passage of vehicles -- in "limited" and/or "open" areas without seeking public participation or initiating the resource management planning process. For example, in Sids Mountain, Indian Creek, and Deep Creek Mountains WSAs,

the BLM permitted, without seeking public participation, the creation of numerous ORV user trails; trails which have left significant and in some instances irreparable scars on the landscape.

63. Accordingly, BLM has violated Executive Order 11644 §3(b) and 43 C.F.R. § 8342.2(a), and section 706(1) of the APA, 5 U.S.C. § 706(1).

Fifth Cause of Action

BLM Has Failed to Conform Its Actions to Approved Land Use Management Plans
(43 C.F.R. § 1610.5)

64. The allegations contained in paragraphs 1-63 are incorporated by reference herein.

65. 43 C.F.R. § 1610.5-3 states that "[a]fter a plan is approved or amended . . . the District and Area Manager shall take appropriate measures . . . to make operations and activities . . . conform to the approved plan or amendment within a reasonable period of time."

66. As set forth above, every Utah BLM field office has land use planning documents whose nondiscretionary future duties and commitments to manage ORVs have not been carried out. These commitments include: the preparation of detailed ORV implementation plans and/or ORV travel plans, the preparation of maps and other informational materials for distribution to the public, the creation of monitoring plans and protocols, and the marking and signing of designated trails. Accordingly, BLM has violated 43 C.F.R. § 1610.5-3 and section 706(1) of the APA, 5 U.S.C. § 706(1).

Sixth Cause of Action

Violation of FLPMA's WSA Non-Impairment Standard
(43 U.S.C. § 1782(c))

67. The allegations contained in paragraphs 1-66 are incorporated by reference herein.

68. Section 1782(c) of FLPMA states that BLM shall manage WSAs "in a manner so as not to impair the suitability of such areas for preservation as wilderness."

69. BLM has in the past, and continues today to permit ORVs to impair the suitability of existing WSAs from entry into the national wilderness preservation system.

70. For example, WSAs such as Parunuweap, Canaan Mountain, Behind the Rocks, and Sids Mountains all are suffering impairment that may ultimately disqualify them from wilderness designation. Accordingly, BLM has violated 43 C.F.R. § 1782(c) and section 706(1) of the APA, 5 U.S.C. § 706(1).

Seventh Cause of Action

Failure to Produce Supplemental Environmental Impact Statements
(42 U.S.C. § 4332 and 40 C.F.R. § 1502.9*)*

71. The allegations contained in paragraphs 1-70 are incorporated herein by reference.

72. NEPA directs federal agencies proposing "major federal actions significantly affecting the quality of the human environment" to prepare an environmental impact statement. See 42 U.S.C. § 4332(2)(c). 40 C.F.R. § 1502.9(c)(i) and (ii) further direct federal agencies to prepare

a supplemental environmental impact statement if "the agency makes substantial changes in the proposed action" or if "there are new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts."

73. Every Utah BLM Field Office's land use planning documents, including resource management plans, management framework plans, and plan amendments, fail to accurately analyze the current use of ORVs on BLM lands, and specifically, fail to analyze the environmental impacts of that use, the relationship between the short-term use of the environment and the maintenance and enhancement of long-term productivity, and any irreversible and irretrievable commitments of resources created by ORV use. Accordingly, BLM's failure to prepare supplemental EISs violates 42 U.S.C. 4332, § 40 C.F.R. 1502.9(c)(i) and (ii), and section 706(1) of the APA, 5 U.S.C. § 706(1).

Eighth Cause of Action

Violation of the Administrative Procedure Act
(5 U.S.C. § 706(1))

74. The allegations contained in paragraphs 1-73 are incorporated by reference herein.

75. The Secretary and BLM have failed to comply with the duties clearly enumerated in Executive Orders 11644 and 11989, and 43 C.F.R. §§ 1610.5-3 and 8341-8343, as set forth above. Such failure constitutes agency action unlawfully withheld or unreasonably delayed, and thus SUWA is entitled to a finding that the Secretary and BLM has violated the APA, 5 U.S.C. § 706(1).

Ninth Cause of Action

Failure to Prevent ORV Damage and
Preserve Full Range of Options
(42 U.S.C. § 4332 and 40 C.F.R. § 1506.1)

76. The allegations contained in paragraphs 1-75 are incorporated herein by reference.

77. NEPA directs federal agencies proposing "major federal actions significantly affecting the quality of the human environment" to prepare an environmental impact statement. See 42 U.S.C. § 4332(2)(c). 40 C.F.R. § 1506.1(a) further directs federal agencies preparing an environmental impact statement to take no action concerning the proposal which would "(1) [h]ave an adverse environmental impact; or (2) [l]imit the choice of reasonable alternatives."

78. The BLM is currently considering a proposal to create numerous FLPMA §202 WSAs throughout Utah. See 64 Fed. Reg. 59787-59789 (Nov. 3, 1999) ("Notice of Intent to Modify Scope of Statewide Environmental Impact Statement (EIS) and Multiple-Plan Amendments Considering Establishment of New Wilderness Study Areas (WSAs) on Selected Public Lands in Utah, and Call for Additional Information). Currently, the BLM permits ORVs to travel within these proposed WSA on "existing routes and ways," or, in some instances, cross-country. This ORV travel has resulted in damage which is having adverse environmental impacts and may, if unchecked, limit the opportunity for these lands to be protected as WSAs.

79. Accordingly, the BLM's failure to preserve a full range of options violates 42 U.S.C. § 4332, 40 C.F.R. § 1506.1(a), and section 706(1) of the APA, 5 U.S.C. § 706(1).

Tenth Cause of Action

Violation of FLPMA's
Non-Degradation Standard
(43 U.S.C. § 1732(b))

80. The allegations contained in paragraphs 1-79 are incorporated herein by reference.

81. Section 1732(b) of FLPMA states that BLM shall manage its lands "to prevent undue and unnecessary degradation."

82. BLM has in the past and continues today to permit ORV damage to cause undue and unnecessary degradation to Utah BLM lands. For example, lands proposed for wilderness designation in America's Redrock Wilderness Bill such as Eagle Canyon, Indian Creek, and Cedar Mountains North are suffering ORV caused damage and degradation.

83. Accordingly, BLM has violated 43 C.F.R. § 1732(b) and section 706(1) of the APA, 5 U.S.C. § 706(1).

PRAYER FOR RELIEF

WHEREFORE, plaintiffs respectfully pray that this Court enter judgment in its favor and against the Honorable Bruce Babbitt, Acting Director Tom Fry, and the Bureau and Land Management and that the Court:

(1) Declare that defendants have violated Executive Order 11644, as amended by Executive Order 11989, the Federal Land Policy Management Act, the Administrative Procedure Act, and their implementing regulations as set forth above;

(2) Declare that in "limited" areas BLM must designate specific roads and trails available for ORV use, and that such designations must minimize ORV effects;

(3) Declare that the BLM must provide public information in the form of road and trail markings, and travel maps detailing which lands are available for motorized travel;

(4) Declare that BLM must engage in comprehensive and systematic monitoring of ORV use on lands within its control;

(5) Declare that BLM has violated § 603(c) of the Federal Policy Management Act by permitting ORVs to impair the suitability of existing wilderness study areas for entry into the national wilderness preservation system.

(6) Award injunctive relief prohibiting the use of all ORVs on lands currently identified by the BLM as having wilderness characteristics, as well as those lands identified within the America's Redrock Wilderness Bill, H.R. 1732, that are suffering significant ORV caused impairment of their resources, including suitability for entry into the National Wilderness Preservation System.

(7) Declare that BLM has violated 40 C.F.R. § 1506.1 by permitting ORVs to impair the wilderness qualities of lands proposed by the BLM in its ongoing statewide wilderness study area environmental impact studies for FLPMA §202 WSA status.

(8) Declare that BLM has violated 43 C.F.R. §1610.5-3 by failing to conform agency actions with the specific terms and conditions detailed in its various land use management plans to manage ORV use on Utah BLM lands.

(9) Retain jurisdiction of this action to ensure compliance with its decree;

(10) Award plaintiffs' costs incurred in pursuing this action, including attorney's fees, as authorized by the Equal Access to Justice Act, 28 U.S.C. § 2412(d), and other applicable provisions;

(11) Grant such other and further relief as is proper.

Respectfully submitted this __ day of May, 2000.

_____

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

SOUTHERN UTAH WILDERNESS ALLIANCE a Utah non-profit corporation, THE WILDERNESS SOCIETY, a national non-profit corporation, THE SIERRA CLUB, a California non-profit corporation, THE GREAT OLD BROADS FOR WILDERNESS, a Utah non-profit corporation, WILDLANDS CPR, a Montana non-profit corporation, UTAH COUNCIL OF TROUT	*	Case No. 2:99CV 852 K Judge Kimball Magistrate Boyce **THIRD AMENDED COMPLAINT**

UNLIMITED, a Utah non-profit organization, AMERICAN LANDS ALLIANCE, a national non-profit corporation, and THE FRIENDS OF THE ABAJOS, a Utah non-profit corporation,

Plaintiffs,

vs.

BRUCE BABBITT, United States Department of Interior in his capacity as Secretary of Interior, TOM FRY, Director, Bureau of Land Management, and THE BUREAU OF LAND MANAGEMENT,

Defendants,

and

UTAH SHARED ACCESS ALLIANCE, a Utah non-profit corporation, BLUE RIBBON COALITION, an Idaho non-profit corporation, ELITE MOTORCYCLE TOURS, a Utah corporation, and ANTHONY CHATTERLY,

Defendants-Intervenors.

INTRODUCTION

1. This suit challenges the Bureau of Land Management's ("BLM's") failure to control one of the most significant threats to the environmental health of Utah's public lands: unregulated off-road vehicle ("ORV") use. BLM is obligated by Executive Orders, federal laws, and its own regulations to, among other things, prevent the impairment of wilderness study areas ("WSAs"), minimize the effects of ORVs on public land resources, consistently implement the terms and conditions of its land use plans ("LUPs"), and determine whether its LUPs and their accompanying environmental analyses accurately evaluate current levels of ORV use and damage on the public lands. BLM has neglected these responsibilities, and, as a direct result of that failure, irresponsible ORV use continues to irreparably damage Utah's most spectacular public lands, including WSAs.

JURISDICTION AND VENUE

2. This court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question).

3. Venue is proper in the Central Division of the United States District Court for the District of Utah pursuant to 28 U.S.C. § 1391(e) because the statutory violations alleged herein all occurred within the state of Utah.

PARTIES

4. Plaintiff SOUTHERN UTAH WILDERNESS ALLIANCE is a non-profit corporation dedicated to the sensible management of all public lands within the State of Utah, to the preservation and protection of plant and animal species, and to the preservation of Utah's remaining wild and

undeveloped lands. SUWA has more than 15,000 members, many of whom reside in Utah. SUWA members and staff use and enjoy BLM lands throughout Utah for a variety of purposes, including scientific study, recreation, and aesthetic appreciation. Furthermore, SUWA members and staff have a substantial interest in this matter because they have, and will continue to suffer real and immediate harm as Utah's remaining wild lands are damaged by unrestricted ORV abuse, as alleged below. SUWA is also a charter member of the Utah Wilderness Coalition ("UWC"), a coalition of over 200 local and national organizations dedicated to the passage of America's Redrock Wilderness Act. SUWA brings this action on its own behalf and on behalf of its adversely affected members.

5. Plaintiff THE WILDERNESS SOCIETY ("TWS") is a non-profit national membership organization founded in 1935 and devoted to preserving wilderness and wildlife on our public lands, and fostering an American land ethic. The Wilderness Society is particularly focused on ensuring that remaining roadless lands are managed to preserve their wild character -- free from roadbuilding, logging, mining, off-road vehicle use, and other development -- and on protecting additional lands as designated wilderness. The Wilderness Society has over 180,000 members nationwide, approximately 1200 of whom reside in Utah. Nationally, many of TWS' members use Utah BLM lands for business and recreation. TWS is also a charter member of the UWC and dedicated to the passage of America's Redrock Wilderness Act. TWS members suffer direct harm by the unregulated use of ORVs in some of Utah's most fragile and stunning lands.

6. Plaintiff THE SIERRA CLUB is a national conservation organization with a membership of approximately 560,000. The Utah Chapter is the Utah division of the Sierra Club and has over 4000 members. The

Sierra Club's purposes include protecting and enhancing by all lawful means the natural resources and human environment of the United States and the earth, and to explore, enjoy, and preserve those resources. Specifically, the Sierra Club's purposes include advocating responsible management of public lands resources in the state of Utah, and the Utah Chapter has a long history of public education and advocacy to protect such resources. The Sierra Club is also a charter member of the UWC and dedicated to the passage of America's Redrock Wilderness Act. Sierra Club members who use and enjoy the areas described in this complaint as suffering damage from ORVs are directly injured by such damage.

7. Plaintiff THE GREAT OLD BROADS FOR WILDERNESS ("Great Old Broads") is a non-profit corporation with over 1,600 members nation-wide, many of whom reside in Utah. Great Old Broads supports the inclusion of America's threatened wild lands into the National Wilderness Preservation System. In addition, Great Old Broads was formed to protect the interests of senior populations who enjoy access to roadless areas without mechanized means of transportation and its associated impacts on the environment. Many of Great Old Broad's members travel to southern Utah annually to hike, camp, fish, paint, and photograph. The Great Old Broads is also a member of the UWC and dedicated to the passage of America's Redrock Wilderness Act. Great Old Broad's members suffer actual and immediate harm by rampant and uncontrolled ORV use in some of Utah's most fragile and spectacular lands.

8. Plaintiff WILDLANDS CENTER FOR PREVENTING ROADS ("Wildlands CPR") is a non-profit organization whose mission is to revive and protect the natural, undeveloped character of public lands by promoting appropriate road removal and revegetation, preventing

inappropriate and environmentally destructive road construction, and regulating motorized recreation where necessary to protect the environment. Wildlands CPR is a national clearinghouse and network, providing citizens with tools and strategies to promote sensible, but not excessive, transportation routes. Wildlands CPR works with over 450 members nationwide, and has several members and affiliated organizations in Utah. Almost half of its Utah members are non-profit organizations, and many of their members visit and recreate throughout Utah BLM lands. Wildlands CPR's members are suffering real and immediate harm as a result of unregulated ORV use and abuse throughout these lands.

9. Plaintiff the UTAH COUNCIL OF TROUT UNLIMITED ("Trout Unlimited") is a non-profit organization whose mission is to preserve, protect, and restore Utah's cold water fisheries and their watersheds. The Utah Council represents eight local Utah Trout Unlimited chapters and has more than 1,200 members, most of whom reside in Utah. Trout Unlimited's members use and enjoy Utah's BLM lands for a variety of purposes, but chiefly to fish and enjoy access to Utah's spectacular trout fishing. Trout Unlimited's members suffer real and actual harm by uncontrolled and irresponsible ORV use in some of Utah's fragile wetland and riparian areas.

10. Plaintiff AMERICAN LANDS ALLIANCE is a non-profit organization committed to participating in and educating the public about Utah public lands issues, including ORV use and abuse on BLM lands. American Lands Alliance represents and serves grassroots environmental groups nationwide and reaches more than 2,500 activists, many of whom reside in Utah. American Lands Alliance staff and members use and enjoy Utah's BLM lands for a number of purposes, including hiking, birding, fishing, and enjoying peaceful solitude. These people are suffering real and immediate harm from

uncontrolled ORV abuses on BLM lands.

11. Plaintiff REDROCK FORESTS[1] is a non-profit organization dedicated to the preservation and restoration of fully functioning natural ecosystems and native species in southeastern Utah's canyon country. Redrock Forests has more than 250 members, many of whom reside in Utah. The organization is particularly concerned that the explosion of ORV use in southeastern Utah is greatly impacting the integrity of Utah BLM lands, and it seeks to limit ORV access, funding, and impacts to an amount that equals their percentage of the total public lands user population. Redrock Forests members use Utah BLM lands for hiking, biking, scientific study, birding, and to enjoy peaceful solitude. Its members are suffering a significantly diminished experience on these same lands because of the rapid expansion of user created trails and ORV impacts, including noise, scarring of the landscape, and harassment of wildlife.

12. Defendant BLM is the agency within the U.S. Department of the Interior directly responsible for carrying out the Department's obligations under statutes, regulations, and Executive Orders governing ORV use. BLM manages approximately 23 million acres of public lands in Utah.

13. Defendant Gale Norton is the Secretary of the United States Department of the Interior and, among other things, is charged with overseeing the management of the nation's BLM lands. The Secretary is further charged with implementing statutes, regulations, and Executive Orders 11644 and 11989 on the lands within her control. Ms. Norton is sued in her official capacity as Secretary of the Department of the Interior.

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[1] Redrock Forests is the successor organization of "Friends of the Abajos," a named plaintiff in the second amended complaint.

14. Defendant Kathleen Clarke is the Director of the Bureau of Land Management, and in that role is charged with the duty of the management of the nation's BLM lands. Ms. Clarke is sued in her official capacity as Director of the Bureau of Land Management.

BACKGROUND FACTS

A. ORV DAMAGE TO PUBLIC RESOURCES

15. The term ORV is used to describe motorized vehicles equipped for travel off of improved and maintained roads. Such vehicles include high-clearance jeeps and trucks, cross-country motorcycles, dune buggies, and all-terrain vehicles. ORVs cause damage to soils and vegetation; harm to wildlife and wildlife habitat; degradation of both water quality and riparian health; and harm to cultural resources. Uncontrolled ORV use also causes significant conflicts among public land users, as well as the impairment of wilderness study areas.

Harm to Soils

16. Fragile soils are damaged by ORV use. Even the single pass of an ORV on sensitive soils, like those found throughout eastern Utah, can cause permanent damage. Soil disruption and soil compaction are among the most readily identified results of ORV travel. Soil disruption includes such things as increased soil erosion, decreased soil stability, and destruction of organic crusts. Soil compaction generally refers to increasing soil density and impermeability directly resulting from ORV travel. ORV-caused soil erosion also degrades water and air quality.

17. In many of Utah's most spectacular lands, including the lands managed by the BLM's Moab, Monticello, and Price field offices, evidence of ORV caused soil erosion is commonplace and widespread.

Harm to Vegetation

18. ORVs significantly impact vegetation on Utah BLM lands. These impacts range from the destruction of fragile cryptobiotic soils, to the loss of annual and perennial species, as well as damage to mature trees. In many instances, web-like networks of ORV trails form broad areas largely denuded of vegetation.

19. When taken cross-country or off established routes, ORVs cause significant damage to cryptobiotic soil crusts that are critical to many plant communities. These living crusts are critical to ecosystem health and are largely responsible for maintaining soil stability, retaining critical moisture, reducing wind erosion, and for increasing soil fertility.

20. Even a single pass by an ORV is sufficient to destroy these crusts, and recurrent ORV travel causes substantial harm.

Harm to Wildlife

21. ORV use causes direct and indirect harm to wildlife. ORV use often leads to reduced density and diversity of small mammal populations, through both through direct mortality and loss of critical habitat. For example, cross-country travel crushes the burrows and other shelters that are critical for desert species to seek shelter from daytime heat.

22. Additionally, while on their wintering range, elk and mule deer are particularly susceptible to ORV disturbances.

Harm to Water Quality

23. ORVs have both direct and indirect negative impacts on Utah's water quality.

24. ORV use in and near stream and riparian systems results in increased turbidity, increased stream temperature, and increased sedimentation.

Harm to Cultural Resources

25. The proximity of archeological sites to motorized vehicle access routes is directly correlated to the level of looting and/or vandalism these sites receive.

26. Utah BLM knows of numerous cases in which ORVs have run over archaeological sites, or enhanced access that has, in turn, led to vandalism.

Increased User Conflicts

27. ORV use displaces non-motorized trail users and studies have shown that other mechanized trail users (i.e., mountain bikes) are less likely to visit an area with widespread ORV use.

28. ORV and non-motorized conflicts occur throughout Utah's BLM lands. For example, BLM's Price field office and Henry Mountains Field Station have received numerous letters from non-motorized visitors to the San Rafael Swell and Factory Butte area detailing altercations with ORV users or concerns about ORV damage.

Wilderness Suitability

29. ORVs have caused, and continue to cause, significant impairment to WSAs.

30. While BLM's internal guidance permits ORVs to travel pre-existing routes within WSAs, many ORV users do not remain on these trails but instead travel cross-country and create additional new routes causing damage similar to that described above.

31. For example, ORVs legally access WSAs such as Parunuweap and Sids Mountain through "existing" trails, but then proceed to travel off-route and cause impairment to wilderness resources.

B. LEGAL FRAMEWORK FOR MANAGEMENT OF ORVS ON PUBLIC LAND

32. In 1972, President Nixon issued Executive Order 11644, entitled "Use of Off-Road Vehicles on the Public Lands." That Executive Order imposed a number of specific and non-discretionary duties on the Secretary to control and minimize the effects of ORV use. These duties include: classifying all BLM lands as either "open," "closed," or "limited" to ORV travel; designating trails for ORV use in limited areas; marking areas and trails and providing the public with maps depicting such classifications and designations; minimizing the effects of ORV use on specifically identified natural resources; and monitoring ORV impacts throughout BLM lands.

33. In 1978, President Carter issued Executive Order 11989, which amended Executive Order 11644 (collectively "the Executive Orders"), and gave federal agencies additional direction and authority to control ORV use. Executive Order 11989 empowered federal agencies to

adopt a "closed, unless signed open" policy, and also to immediately close areas suffering from ORV damage.

34. The Executive Orders were enacted in furtherance of the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321 et seq., and are found in note following 42 U.S.C. § 4321.

35. In 1979, the BLM issued its off-road vehicle regulations, 43 C.F.R. §§ 8340-42. These regulations further implement, and largely restate, the planning, informational, and monitoring requirements of the Executive Orders.

C. UTAH BLM'S FAILURE TO IMPLEMENT THE EXECUTIVE ORDERS, FEDERAL LAWS, AND AGENCY REGULATIONS

36. The Utah BLM State Office is located in Salt Lake City, Utah, with eleven field offices throughout Utah. These field offices are in Salt Lake City, Fillmore, Richfield, Vernal, Price, Moab, Monticello, Kanab, St. George, Grand Staircase-Escalante, and Cedar City. Each field office is guided by Resource Management Plans (RMPs) and/or Management Framework Plans (MFPs) prepared pursuant to the Federal Land Policy and Management Act ("FLPMA"), 43 U.S.C. §§ 1701 et seq.

37. All of Utah's BLM lands have been classified in MFPs, RMPs, or subsequent plan amendments as either "open," "limited," or "closed" to ORV travel.

38. An "open" designation permits ORVs to travel anywhere within that area, with no restrictions. Every Utah field office has lands designated as "open" to cross-country ORV travel, though many of these designations were made decades ago when ORV use was low throughout Utah.

39. Additionally, all Utah BLM Field Offices have some lands classified as "limited" to ORV travel. Generally, these limitations restrict ORVs to either "existing" or "designated" routes and trails, as well as seasonal wildlife restrictions.

40. Although many "limited" areas restrict ORV use to "existing" routes and trails, BLM does not know the routes to which ORVs are restricted because all Utah field offices failed to inventory the existing trail networks when the various planning documents were created. As a result of that failure, BLM offices such as the Monticello field office and Henry Mountains field station that have lands classified as "limited to existing routes and trails" have seen a broad expansion of the "existing" trail network.

41. No Utah BLM field office has a map or information indicating the existing trail network at the time its respective land use plan was finalized.

42. BLM law enforcement is unable to enforce ORV "limited" classifications without actual trail "designations" being published in the Federal Register. Absent these designations, a "limited" classification is in practical and legal effect the same as an "open" classification.

43. In each of the land use planning documents in which BLM classified its lands for ORV use, the agency made specific commitments regarding future actions that would be taken to minimize and regulate the impacts of ORV use. These commitments include: the preparation of more detailed ORV management or travel plans, the preparation of maps and other informational materials for

distribution to the public, the creation of monitoring plans and protocols for such monitoring, and the marking and signing of designated trails. Many of these commitments have not been carried out.

44. BLM has not prepared and implemented an ORV implementation plan for the San Juan resource area, as required by the 1991 San Juan RMP.

45. BLM does not have a formalized monitoring plan to monitor ORV use in the San Juan resource area, as required by the 1991 San Juan RMP.

46. BLM has not prepared or implemented ORV trail designations through an activity level plan as required by the 1999 St. George RMP.

47. BLM's 2000 Monument Management Plan restricted ORVs to designated trails within the Grand Staircase-Escalante National Monument ("GSENM") or closed areas to ORVs altogether. BLM has not completed on-the-ground signing and other steps necessary to implement the GSENM 2000 management plan.

48. BLM has not prepared or established ORV designations as required by the 1990 Price River ORV Implementation Plan.

49. BLM has not distributed an ORV designation brochure as required by the 1990 Price River ORV Implementation Plan.

50. BLM has not prepared an area-wide ORV plan for the Diamond Mtn. planning area, as required by the 1991 Diamond Mountain RMP.

51. BLM has not prepared or implemented an ORV monitoring system in the Book Cliffs planning area, as required by the 1985 Book Cliffs RMP.

First Cause of Action

Failure to Designate Trails
(Executive Order 11644 §3 and 43 C.F.R. §8342.1)

52. The allegations of paragraphs 1-51 are incorporated herein by reference.

53. Section 3 of Executive Order 11644 provides that the Secretary "shall designate" trails where off-road vehicle use is impermissible, as well as designating trails where such use is allowed. 43 C.F.R. § 8342.1 also provides that BLM shall designate areas and trails where ORV use is permissible and impermissible.

54. With the exception of the 2003 Price field office San Rafael Swell Route Designation Plan, every Utah BLM field office has failed to comply with the Executive Orders and regulations and designate trails available for ORV use.

55. Accordingly, BLM's failure to comply with Executive Order 11644 § 3(a) and 43 C.F.R. § 8342.1 is arbitrary, capricious, and otherwise not in accordance with law and/or constitutes final agency action unlawfully withheld or unreasonably delayed, in violation of 5 U.S.C. § 706.

Second Cause of Action

Failure to Mark Designated Areas and Trails
(Executive Order 11644 §5 and 43 C.F.R. § 8342.2)

56. The allegations contained in Paragraphs 1-51 are incorporated herein by reference.

57. Section 5 of Executive Order 11644 directs the Secretary to "ensure that areas and trails where off-road vehicle use is permitted are well marked and [to] provide for the publication and distribution of information, including maps, describing such areas and trails and explaining the conditions of vehicle use."

58. 43 C.F.R. § 8342.2(c) requires BLM to mark and take other appropriate measures to identify areas and trails so that the public will be aware of locations and limitations thereto." BLM must prepare "appropriate informational materials, including maps, available for public review." The agency must also publish its trail designations in the Federal Register. See id. See also 43 C.F.R. § 1610.5-1(b).

59. Every Utah BLM field office has failed to accurately mark and sign most of the areas and trails lawfully available for ORV use. In addition, all Utah BLM field offices have failed to prepare maps identifying trails lawfully open for ORV use.

60. Accordingly, BLM's failure to comply with Executive Order 11644 § 5 and 43 C.F.R. § 8342.2(c) is arbitrary, capricious, and otherwise not in accordance with law and/or constitutes final agency action unlawfully withheld or unreasonably delayed, in violation of 5 U.S.C. § 706.

Third Cause of Action

BLM Has Failed to Conform Its Actions to ApprovedLand Use Management Plans (43 U.S.C. § 1732(a) and 43 C.F.R. § 1610.5)

61. The allegations contained in paragraphs 1-51 are incorporated by reference herein.

62. FLPMA requires the Department of the Interior and BLM to "manage the public lands ... in accordance with the land use plans [LUPs] developed ... under section 1712 [of FLPMA]." 43 C.F.R. § 1732(a).

63. 43 C.F.R. § 1610.5-3 states that "[a]fter a plan is approved or amended . . . the District and Area Manager shall take appropriate measures . . . to make operations and activities . . . conform to the approved plan or amendment within a reasonable period of time."

64. BLM has failed to consistently implement the terms and provisions of its various land use plans, as set forth above.

65. Accordingly, BLM's failure to comply with 43 U.S.C. § 1732(a) and 43 C.F.R. § 1610.5-3 is arbitrary, capricious, and otherwise not in accordance with law and/or constitutes final agency action unlawfully withheld or unreasonably delayed, in violation of 5 U.S.C. § 706.

Fourth Cause of Action

Violation of FLPMA's WSA Non-Impairment Standard (43 U.S.C. § 1782(c))

66. The allegations contained in paragraphs 1-51 are incorporated by reference herein.

67. Section 1782(c) of FLPMA states that BLM shall manage WSAs "in a manner so as not to impair the suitability of such areas for preservation as wilderness."

68. BLM has in the past, and continues today to permit ORVs to impair the suitability of WSAs from entry into the national wilderness preservation system.

69. BLM has failed to prevent ORV impairment of the following WSAs: Parunuweap, Canaan Mountain, Moquith Mountain, and Sids Mountains. Accordingly, BLM's failure to comply with 43 C.F.R. § 1782(c) is arbitrary, capricious, and otherwise not in accordance with law and/or constitutes final agency action unlawfully withheld or unreasonably delayed, in violation of 5 U.S.C. § 706.

Fifth Cause of Action

Failure to Produce Supplemental Environmental Impact Statements
(42 U.S.C. § 4332 and 40 C.F.R. § 1502.9)

70. The allegations contained in paragraphs 1-51 are incorporated herein by reference.

71. NEPA directs federal agencies proposing "major federal actions significantly affecting the quality of the human environment" to prepare an environmental impact statement. See 42 U.S.C. § 4332(2)(c).

72. 40 C.F.R. § 1502.9(c)(i) and (ii) further direct federal agencies to take a hard look and determine if "there are new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts," and if so to prepare a supplemental NEPA document. In addition, NEPA's regulations require federal agencies to prepare a supplemental environmental impact statement if "the agency makes substantial changes in the proposed action."

73. Every Utah BLM Field Office has failed to take a hard look at whether its land use planning documents, including resource management plans, management framework plans, plan amendments, and activity level plans, accurately analyze current ORV use and damage on Utah BLM lands, and where necessary prepare supplemental NEPA documents to address these changes.

74. Accordingly, BLM's failure comply with 42 U.S.C. 4332 and § 40 C.F.R. 1502.9(c)(i) and (ii), is arbitrary, capricious, and otherwise not in accordance with law and/or constitutes final agency action unlawfully withheld or unreasonably delayed, in violation of 5 U.S.C. § 706.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs respectfully pray that this Court enter judgment in its favor and against the Honorable Gale Norton, Director Kathleen Clarke, and the Bureau and Land Management and that the Court:

(1) Declare that defendants have violated Executive Order 11644, as amended by Executive Order 11989, the Federal Land Policy and Management Act, the National Environmental Policy Act, their implementing regulations as set forth above;

(2) Declare that BLM has violated Executive Order 11644 § 3 and 43 C.F.R. § 8342 by failing to designate specific roads and trails available for ORV use in "limited areas";

(3) Declare that BLM has violated Executive Order 11644 § 5 and 43 C.F.R. § 8342 by failing to provide public information in the form of road and trail markings,

and travel maps detailing which lands are available for motorized travel;

(4) Declare that BLM has violated § 603(c) of the Federal Land Policy and Management Act by permitting ORVs to impair the suitability of wilderness study areas for entry into the national wilderness preservation system;

(5) Declare that BLM has violated 43 C.F.R. §1610.5-3 by failing to conform agency actions with the specific terms and conditions detailed in its various land use management plans to manage ORV use on Utah BLM lands.

(6) Declare that BLM has violated NEPA implementing regulation 40 C.F.R. § 1502.9 by failing to take a hard look at whether current levels of ORV use and damage exceed those analyzed in existing land use plans and their respective NEPA analyses;

(7) Declare that BLM has violated NEPA by failing to prepare supplemental NEPA analyses to consider, evaluate, and disclose the current levels of ORV use and damage;

(8) Retain jurisdiction of this action to ensure compliance with its decree;

(9) Award plaintiffs' costs incurred in pursuing this action, including attorney's fees, as authorized by the Equal Access to Justice Act, 28 U.S.C. § 2412(d), and other applicable provisions; and

(10) Any injunctive relief requested by SUWA will not illegally infringe upon perfected R.S. 2477 rights-of-way that meet the standard set out by this Court in Southern Utah Wilderness Alliance v. BLM, 147 F. Supp.2d 1130 (D. Utah 2001), or that federal courts have recognized pursuant

to the Quiet Title Act. In addition, any injunctive relief requested will not seek to restrict access to Utah School and Institutional Trust Lands in contravention of the standards recognized in State of Utah v. Andrus, 486 F. Supp. (D. Utah 1979).

Respectfully submitted this 23rd day of July, 2003.

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Attorneys for Plaintiffs
Southern Utah Wilderness Alliance et al.

IN THE UNITED STATES
DISTRICT COURT FOR
THE DISTRICT OF UTAH

CENTRAL DIVISION

SOUTHERN UTAH
WILDERNESS
ALLIANCE et al.,

Plaintiffs, ORDER

vs. Case No. 2:99CV852K

BRUCE BABBITT et al.,

Defendants,

and

UTAH SHARED ACCESS
ALLIANCE et al.,

Defendant-Intervenors,

and

SAN JUAN COUNTY, UTAH et al.,

Defendant-Intervenors.

After a six-day evidentiary hearing on Plaintiffs' motions for a temporary restraining order and for a preliminary injunction, and after a subsequent hearing on Defendant-Intervenors Utah Shared Access Alliance et al.'s Motion to Dismiss, which pertained to the claims that were the subject of the preliminary injunction hearing, this court, on December 22, 2000, issued a Memorandum Decision and Order (the December 22 Order"). The December 22 Order, among other things, dismissed with prejudice Plaintiffs' First, Fifth, Six, and Seventh Claims for Relief to the extent they pertain to the wilderness study areas ("WSAs") and the § 202 Areas addressed during the preliminary injunction hearing. Consequently, the court also denied as moot Plaintiffs' Motion for a Preliminary Injunction.

The court finds that there is no just reason for delay and expressly directs the entry of judgmdent on these claims pursuant to Rule 54(b) of the Federal Rules of Civil Procedure ("Rule 54(b)").

Accordingly, for good cause appearing, IT IS HEREBY ORDERED that the Clerk of the Court is directed, pursuant to Rule 54(b), to enter judgment in favor of Defendants and Defendant-Intervenors on Plaintiffs' First, Fifth, Six, and Seventh Claims for Relief, to the extent these claims pertain to the WSAs and § 202 Areas addressed during the preliminary injunction hearing.

DATED this 9th day of February, 2001.

BY THE COURT:

DALE A. KIMBALL
United States District Judge

HAND DELIVERED

September 14, 1999

Tom Fry
Deputy Director - Bureau of Land Management
1849 C. Street NW
Washington, D.C. 20240

Dear Directory Fry:

The Southern Utah Wilderness Alliance is pleased to welcome you to Utah for State Director Wisely's swearing in ceremony. We are looking forward to working with Director Wisely on a range of issues, including the § 202 wilderness inventory EIS and off-road vehicle management.

As you may know, ORV use and abuse is a pressing issue in Utah, and SUWA is gravely concerned that their serious, and indeed permanent impacts, are destroying Utah BLM lands. To that effect, I have included a handful of photographs taken over the Labor Day weekend near Factory Butte, an internationally recognized landmark, and an area recognized by BLM in 1999 as having wilderness characteristics. I have also attached a copy of the 1988 Henry Mountain Resource Area Off-Road Vehicle Implementation Plan, which specifically identifies the area around Factory Butte as a "special monitoring area," citing concerns of ORV caused damage.

BLM has never conducted this monitoring, and, as the photos enclosed illustrate, unrestricted ORV use is having dramatic impacts. Without such a monitoring

program, BLM has no concept whether ORV impacts are being "minimized" as mandated by Presidential Executive Order and BLM's own regulations.

This is only one example of an ORV problem plaguing Utah BLM statewide. We hope BLM recognizes the severity of this problem, and look forward to it taking the long-overdue steps necessary to curb ORV abuse.

Sincerely,

Stephen Bloch
Staff Attorney

Attachments

October 4, 1999

Dick Manus
Bureau of Land Management - Price Field Office
125 South 600 West
P.O. Box 7004
Price, Utah 84501

Dear Dick:

I wanted to thank you for taking the time to briefly meet with me and talk about the continuing off-road vehicle ("ORV") problem in the San Rafael Swell. SUWA is gravely concerned that abusive ORV use and subsequent impacts are destroying the wilderness qualities of wilderness study areas (WSAs) within the Swell. As I stated, it is firmly SUWA's position, and indeed the BLM's own regulations mandate, that WSAs must be closed to ORV use when they are suffering "impairment." As you well know, 43 C.F.R. § 8341.2 directs BLM managers to immediately close areas suffering "considerable adverse effects" from ORV use and abuse. That section further provides that areas must remain closed until "the adverse effects have been eliminated and measures implemented to prevent recurrence."

In Information Bulletin 99-181, issued on July 13, 1999, from Acting Director Tom Fry to all field officials, the BLM's clear position of not permitting WSA impairment was reiterated. (See attached and excerpted below)

> "It is the BLM's policy that cross-country vehicle use in the WSAs does cause the impairment if wilderness suitability. The BLM policy establishing what is necessary to prevent such impairment is set forth in BLM Manual Handbook H-8550-1, Interim

> Management Policy and Guidelines for Lands Under Wilderness Review. In chapter 1, Paragraph 2.B.a., nonimpairing use is "... a temporary use that does not create surface disturbance ..." Uses that cause surface disturbance are, therefore, impairing uses. In this same chapter in Paragraph 3, under the heading Surface Disturbance, it states "Cross-country vehicle use off boundary roads and existing ways is surface disturbance because the tracks created by the vehicles leave depressions or ruts, compact the soils and trample or compress vegetation."

(Emphasis added).

As you acknowledged on Friday, your staff has prepared a report and summary of WSA impairments throughout the San Rafael Swell; a report that documents rampant ORV abuse and impairment. Because this report documents existing and ongoing impairment, it is incumbent upon you to immediately close the areas identified as suffering such abuse until such time that these threats are eliminated. SUWA strongly disagrees that there are any extraneous factors that would militate against immediately closing areas with identified resource abuses. Furthermore, any resource impairment rises to a level that demands such closure; there simply is no grey areas where impairment does not demand firm and immediate action. To this end, I have enclosed reprinted photographs of ORV caused impairment in Sid's Mountain WSA, taken the week of September 20, for your review and consideration. As these pictures illustrate, and as is true throughout the Swell, ORVs are leaving identified "ways" and causing widespread, permanent resource impairment. Indeed, ORVs do not remain on identified travel routes, but instead drive cross-country across some of Utah's most scenic and fragile lands.

I know ORV abuse is a high priority for your Field Office and expect that you will review BLM's own regulations and guidelines and quickly take the necessary steps to protect these resources; resources that we can all agree demand our utmost energy to preserve and protect for future generations. I look forward to hearing from you how the Price office will be addressing these concerns.

Sincerely,

Stephen Bloch
Staff Attorney

cc: Sally Wisely, State Director
Tom Fry, Acting Director

August 19, 1999

Sally Wisely -State Director
Bureau of Land Management
324 S. State St. Suite 301
P.O. Box 45155
Salt Lake City, Utah 84145-0155

Dear Sally,

I wanted to thank you again for taking the time to sit down with Heidi and I last month. It was good to meet, and we're both looking forward to working with you in the future. Following up on our discussion of off-road vehicles impairing wilderness suitability in existing WSAs, I wanted to share these photos taken in May and August of Canaan Mtn. and Parunuweap WSAs. Photos number 1-3 are all taken from the border of Canaan Mtn. WSA, in an area that is only accessible by the Elephant Butte/Goat Springs Road, which provides ORVs access to both WSAs (see the accompanying 7.5 minute map - this area is circled in orange). As you can plainly tell, these pictures show a BLM constructed barrier, that was intended to prevent ORV access to Broad Hollow (Canaan Mtn. WSA), completely dislodged and destroyed. I have also included a letter from BLM wilderness ranger Mike Salamacha from March 1999, describing both the barrier and the destruction he has witnessed over the years to this area.

Additionally, photos number 4-5 are taken many miles inside the Parunuweap WSA. Notably, these pictures are not taken from an existing road, as you might expect from the apparent high use, but rather on an entirely illegal user trail. (See the accompanying 1:100,000 map - this area is circled in orange). ORV users drive the Poverty Flat Road, which is senselessly cherry-stemmed many miles inside the WSA and creates an indefensible boundary for

BLM, and simply continue on a now well-traveled route. The St. George and Kanab offices are well aware of this route, but because this area is between three BLM office jurisdictions (Cedar City, St. George, and Kanab), BLM has been either unwilling or unable to protect this spectacular resource. Further, about a mile up the "road" from the end of the cherry stem, a natural ledge presents an excellent opportunity for BLM to place a barrier and prevent further ORV abuse. These two examples are representative of statewide ORV caused wilderness impairments occurring right now.

Not to dwell entirely on the negative, we are encouraged by the Cedar City Office's proposed placement of rock barriers in Spring Creek Canyon WSA to prevent further ORV abuse. This is precisely the step BLM needs to take on a statewide basis -- a step that is both long overdue and sorely needed. Of course, vigilant enforcement of this closure is absolutely necessary to its effectiveness, and we have every confidence that law enforcement will take whatever steps necessary to ensure this happens.

Finally, as noted in BLM Information Bulletin 99-181 (July 13, 1999), "cross-country vehicle use in the WSAs does cause the impairment of wilderness suitability . . . [such use] is disturbing because the tracks created by the vehicle leave depressions or ruts, compact the soil and trample vegetation." Though current BLM IMP for Lands Under Wilderness Review does allow vehicle travel in WSAs on existing routes, such travel is only permissible if it does not cause impairment of the wilderness resource. It is simply fictitious for BLM to believe that such impairment is not occurring on and off the numerous "existing" routes within WSAs. Indeed, off-route travel is frequently the rule, and not the exception in Utah WSAs.

I would be happy to speak further with you about this and other ORV issues after you have had a chance to review the photos and perhaps to speak with Field Office managers and staff. Thank you again for your time.

Sincerely,

Stephen Bloch
Staff Attorney

cc: Keith Aller, Special Agent in Charge

PAUL M. WARNER,
United States Attorney (#3389)
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Attorneys For Defendants

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

SOUTHERN UTAH WILDERNESS ALLIANCE, a Utah non-profit corporation, et al.,

Plaintiffs,

vs.

BRUCE BABBITT, United States Department of Interior in his capacity as Secretary of Interior, et al.,

Defendants,

and

UTAH SHARED ACCESS ALLIANCE, a Utah non-profit Corporation, et al.,

Defendants-Intervenors

DEFENDANTS' RESPONSES TO PLAINTIFFS' FIRST SET OF REQUESTS FOR ADMISSIONS

Case No. 2:99CV852K

Request for Admission 35: Impairment has been, and continues to be caused by ORVs within Utah BLM managed wilderness study areas.

Response: The defendants admit that impairment has been caused by ORVs within some Utah wilderness study areas but deny that impairment has been caused in all Utah wilderness study areas. Specifically, there is no known impairment of the Wah Wah WSA, the La Verkin Creek Canyon, the Watchman, Taylor Creek, Goose Creek, Bear Trap, the Joshua Tree Instant Study Area, the Dirty Devil WSA, most of the Mount Ellen-Blue Hills WSA, a portion of the Mount Hilliers WSA, most of the Little Rockies WSA, the Bridger Jack WSA, the Mancos Mesa, and the Daniels Canyon WSA.

(3)

Supreme Court, U.S.
FILED
OCT 10 2003
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No. 03-101

In the Supreme Court of the United States

GALE NORTON, SECRETARY, UNITED STATES DEPARTMENT OF THE INTERIOR, ET AL., PETITIONERS

v.

SOUTHERN UTAH WILDERNESS ALLIANCE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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13 pp

TABLE OF CONTENTS

		Page
I.	This case warrants review because of the legal and practical importance of the question presented	1
II.	There is a clear inconsistency between the decision in this case and decisions of this Court and the Fifth Circuit	4
III.	This case squarely presents the question whether Section 706(1) permits courts to direct how an agency exercises its discretion on a programmatic basis	6

TABLE OF AUTHORITIES

Cases:

Bennett v. *Spear*, 520 U.S. 154 (1997)	6
City of Boerne v. *Flores*, 521 U.S. 507 (1997)	2
Estelle v. *Gamble*, 429 U.S. 97 (1976)	2
FCC v. *Pottsville Broad. Co.*, 309 U.S. 134 (1940)	3
Gulf Oil Corp. v. *Copp Paving Co.*, 419 U.S. 186 (1974)	2
Land v. *Dollar*, 330 U.S. 731 (1947)	2
Larson v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949)	2
Lujan v. *National Wildlife Fed'n*, 497 U.S. 871 (1990)	2, 5, 7, 9
Marsh v. *Oregon Natural Res. Council*, 490 U.S. 360 (1989)	9
NAACP v. *Secretary of Hous. & Urban Dev.*, 817 F.2d 149 (1st Cir. 1987)	6
Sierra Club v. *Peterson*, 228 F.3d 559 (5th Cir. 2000), cert. denied, 532 U.S. 1051 (2001)	4, 5, 6
South Trenton Residents Against 29 v. *Federal Highway Admin.*, 176 F.3d 658 (3d Cir. 1991)	9
U.S. Airways, Inc. v. *Barnett*, 535 U.S. 391 (2002)	2

Constitution and statutes:	Page
U.S. Const. Art. III	3
Federal Land Policy and Management Act of 1976, 43 U.S.C. 1701 *et seq.*	3
43 U.S.C. 1782(c)	6
National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.*	3
42 U.S.C. 4332(2)(C)	9
Administrative Procedure Act, 5 U.S.C. 551 *et seq.*:	
5 U.S.C. 553(e)	10
5 U.S.C. 704	9
5 U.S.C. 706	9
5 U.S.C. 706(1)	*passim*
5 U.S.C. 706(2)	2, 3, 4, 6, 10
Miscellaneous:	
Robert L. Stern et al., *Supreme Court Practice* (8th ed. 2002)	2
S. Doc. No. 248, 79th Cong., 2d Sess. (1946)	9

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REPLY BRIEF FOR THE PETITIONERS

Respondents Southern Utah Wilderness Alliance et al. (SUWA) do not identify any substantial reason why this Court should decline to consider the important and recurring question presented in this case: whether 5 U.S.C. 706(1)—which authorizes courts to "compel agency action unlawfully withheld or unreasonably delayed"—permits judicial review of the adequacy of an agency's day-to-day management of public lands for compliance with general statutory standards and its own planning documents. Indeed, SUWA acknowledges that the Ninth Circuit, like the Tenth Circuit in this case, has recently extended Section 706(1) to such claims, thereby underscoring the broad importance of the question presented here. See Br. in Opp. 23-24; Pet. 9-10, 26-27.

I. THIS CASE WARRANTS REVIEW BECAUSE OF THE LEGAL AND PRACTICAL IMPORTANCE OF THE QUESTION PRESENTED

SUWA initially contends that the interlocutory posture of this case renders it unsuitable for this Court's review. Br. in Opp. 10-13. SUWA is mistaken.

This Court frequently grants certiorari to resolve important threshold questions when, as here, a federal court of appeals has reversed the grant of a motion for dismissal or summary judgment and remanded the case for further proceedings. See, *e.g.*, *Verizon Communications* v. *Law Offices of Curtis V. Trinko, LLP*, No. 02-682 (to be argued Oct. 14, 2003); *Raytheon Co.* v. *Hernandez*, No. 02-749 (argued Oct. 8, 2003); *US Airways, Inc.* v. *Barnett*, 535 U.S. 391, 395 (2002); *City of Boerne* v. *Flores*, 521 U.S. 507, 523 (1997); *Estelle* v. *Gamble*, 429 U.S. 97, 98 (1976); *Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U.S. 186, 191-193 (1974); *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 684-685 (1949); *Land* v. *Dollar*, 330 U.S. 731, 734 (1947); see also Robert L. Stern et al., *Supreme Court Practice* 259-260 (8th ed. 2002). The Court granted certiorari in precisely that posture in *Lujan* v. *National Wildlife Federation*, 497 U.S. 871, 881-882 (1990), which also involved a programmatic challenge to an agency's land management activities and a court of appeals' failure to adhere to the "final agency action" requirement of the Administrative Procedure Act (APA).

The purely legal question presented here concerning the scope of Section 706(1) was definitively addressed below in both the majority opinion and the partial dissent. Neither of those opinions suggests that the court of appeals' holding on *that* question might be subject to revision once the district court conducts a trial on the merits of SUWA's claims.[1]

The question is one of considerable importance. The use of Section 706(1) endorsed by the Tenth Circuit permits courts to engage in wide-ranging review of an agency's on-

[1] After the certiorari petitions were filed, SUWA amended its complaint to add claims under 5 U.S.C. 706(2). See Br. in Opp. App. 27-47. That amendment does not, as SUWA suggests, militate against the Court's consideration of the question presented concerning the scope of 5 U.S.C. 706(1). See Br. in Opp. 12 & n.6. The amended complaint continues to advance the same claims under Section 706(1) that gave rise to the court of appeals' decision sought to be reviewed here.

going administration of a program, to order systemic changes in an agency's operations that were not specifically prescribed by Congress or sought from the agency, and to reorder an agency's priorities for the allocation of scarce resources. See Pet. 27-28. That vision of the relationship between courts and agencies is fundamentally inconsistent with Congress's choice in the APA to confine judicial intervention to cases seeking to compel under Section 706(1), or to set aside under Section 706(2), a discrete final agency action in the nature of a rule, order, or license. See Pet. 10-19. It is also fundamentally inconsistent with the role of Article III courts under the Constitution. See, *e.g.*, *FCC* v. *Pottsville Broad. Co.*, 309 U.S. 134, 141 (1940).

Deferring review of the question presented could produce significant disruption both in this case and more generally. The court of appeals remanded this case for further proceedings on SUWA's claims under Section 706(1) to compel BLM to perform a variety of tasks allegedly required under general provisions of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. 1701 *et seq.*; the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, and BLM's own planning documents. See Pet. App. 2a-3a, 39a.[2] Those proceedings, together with any subsequent appellate review, threaten to be protracted, to divert agency personnel and resources from other endeavors, and to constrain the agency from managing public lands in accordance with its expert judgment as intended in FLPMA. As SUWA acknowledges, if the government defendants in

[2] SUWA suggests that its Section 706(1) claim to compel BLM to comply with its land use plans might be mooted by BLM's completion of tasks identified in those plans. See Br. in Opp. 13. In view of the breadth of that claim (see *id.* App. 20, 42-43), which is not confined to the two monitoring and planning tasks sought at the preliminary injunction stage, there is no reason to believe that the claim would be mooted by BLM's completion of those tasks. See Pet. App. 31a n.17 (noting government's argument that some portions of SUWA's claim were moot).

this case do not conform their conduct to the lower courts' conception of what constitutes, for example, management of public land to prevent "impairment," the potential exists for them to be held in contempt or to face other coercive sanctions. See Br. in Opp. 11-12. Moreover, the decisions of the Ninth and Tenth Circuits stand as binding precedent authorizing judicial intervention on a wide-ranging basis in a broad range of federal programs.

II. THERE IS A CLEAR INCONSISTENCY BETWEEN THE DECISION IN THIS CASE AND DECISIONS OF THIS COURT AND THE FIFTH CIRCUIT

SUWA contends that this Court's review is not warranted because the Tenth Circuit's decision does not "direct[ly] conflict" with this Court's decision in *Lujan* and the Fifth Circuit's en banc decision in *Sierra Club* v. *Peterson*, 228 F.3d 559 (2000), cert. denied, 532 U.S. 1051 (2001). See Br. in Opp. 13-15. Although the question presented here is sufficiently important to warrant review without regard to any conflict, the Tenth Circuit's decision does conflict with both the basic reasoning of *Lujan* and the holding of *Peterson*.

A. SUWA seeks to distinguish *Lujan* as a case arising under Section 706(2). Br. in Opp. 13. As the petition explains, however, the court of appeals' holding in this case on what constitutes reviewable "agency action" under Section 706(1) cannot be reconciled with *Lujan*'s holding on what constitutes reviewable "agency action" under Section 706(2). See Pet. 11-12. SUWA does not attempt to justify giving the term "agency action" a broader meaning in Section 706(1) than in Section 706(2), or applying Section 704's restriction of judicial review under the APA to "final" agency action only to Section 706(2) and not to Section 706(1).

SUWA suggests that *Lujan* is inapposite because it "deals exclusively with standing." Br. in Opp. 13. But *Lujan* explains that an essential component of the APA standing inquiry is whether the plaintiff "identif[ies] some 'agency action'" to which his suit is directed. 497 U.S. at 882. And when, as in that case and this one, review is sought "only under the general review provisions of the APA," the plaintiff must direct his suit to "final agency action." *Ibid.* The Court's conclusion that BLM's ongoing management of public lands is not "an identifiable 'agency action'—much less a 'final agency action'"—under the APA was thus central to the holding in *Lujan*, *id.* at 890, 891, and is controlling here.

SUWA contends that its challenge to aspects of BLM's management of public lands in Utah is narrower than the challenge in *Lujan* to aspects of BLM's management of public lands nationwide. See Br. in Opp. 13-15. That is a distinction without a difference. The essence of this Court's holding in *Lujan* is that the APA permits courts to "intervene in the administration of the laws only when, and to the extent that, a specific 'final agency action' [that] has an actual or immediately threatened effect" is at issue. 497 U.S. at 894. Here, as in that case, SUWA has not directed its APA challenge to such "specific 'final agency action.'"

B. SUWA offers no viable ground on which to reconcile the decisions in this case and *Peterson*, which rejected a Section 706(1) challenge to the Forest Service's timber management practices. Nothing in the Fifth Circuit's analysis of the Section 706(1) question in *Peterson* turned, as SUWA suggests, on whether the plaintiffs' claims involved "every acre of the Texas national forests" or "tried to use *past* legal violations to enjoin all *future* timber sales." Br. in Opp. 15; see *Peterson*, 228 F.3d at 568. Although SUWA further contends that *Peterson* involved "affirmative agency actions" whereas this case involves "true failures to act" (Br. in Opp. 15), such distinctions are essentially semantic, as the Fifth Circuit recognized. See 228 F.3d at 568 ("Almost any objection to an agency action can be dressed up as an agency's failure to act."). Indeed, both this case and *Peterson* involve claims that an agency "has been acting, but the environ-

mental groups simply do not believe its actions have complied with the [governing statute]." *Ibid.*[3]

III. THIS CASE SQUARELY PRESENTS THE QUESTION WHETHER SECTION 706(1) PERMITS COURTS TO DIRECT HOW AN AGENCY EXERCISES ITS DISCRETION ON A PROGRAMMATIC BASIS

SUWA contends that this case does not implicate the question presented in the petition because it is not a "broad programmatic challenge," but a suit to compel "final agency action." Br. in Opp. 17-21. That contention cannot be squared with SUWA's own complaint and with a proper understanding of the courts' authority under Section 706(1).

A. The complaint makes clear that SUWA is not merely seeking a court order that directs BLM to complete some discrete "agency action" that has been unlawfully withheld, much less agency action that is "final" in the sense of "mark-[ing] the 'consummation' of the agency's decisionmaking process" and carrying legal consequences. *Bennett* v. *Spear*, 520 U.S. 154, 177-178 (1997). SUWA is instead seeking to have the district court interject itself into many aspects of BLM's ongoing management of public lands in Utah.

Consider, for instance, SUWA's claim under Section 706(1) that BLM has failed to comply with FLPMA's general requirement that wilderness study areas be managed "so as not to impair the[ir] suitability * * * for preservation as wilderness," 43 U.S.C. 1782(c).[4] With respect to that claim,

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[3] As SUWA observes (Br. in Opp. 22-23), a decision of the First Circuit allowed an agency's "*pattern* of behavior" to be challenged under Section 706(1) and Section 706(2). See *NAACP* v. *Secretary of Hous. & Urban Dev.*, 817 F.2d 149, 158, 160-161 (1987) (Breyer, J.). That decision predated *Lujan*'s analysis of the "final agency action" limitation to judicial review under the APA.

[4] SUWA takes issue with the characterization of FLPMA's non-impairment standard as a "general" one. See, *e.g.*, Br. in Opp. 2, 14. The court of appeals recognized, however, that FLPMA leaves BLM with broad discretion regarding the interpretation and implementation of that

the complaint alleges simply that "BLM has in the past, and continues today to permit [off-road vehicles] to impair the suitability of existing [wilderness study areas] from entry into the national wilderness preservation system," and identifies four areas as "example[s]." Br. in Opp. App. 21, 44. The claim can only be understood as seeking "a general judicial review of the BLM's day-to-day operations" concerning off-road vehicle management—the very sort of claim that *Lujan* characterized as an impermissible "programmatic" challenge, as distinguished from a permissible challenge to discrete "final agency action." 497 U.S. at 890-891, 899.[5]

B. SUWA contends that the relief sought on its Section 706(1) claims is "final agency action," so that this case does not present the question whether action that is not of that character may be compelled under Section 706(1). See Br. in Opp. 18-21. That is not so.

First, SUWA's complaint does not identify *any* "final agency action" that is required by FLPMA and that SUWA

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standard. See Pet. App. 12a-14a; see also *id.* at 7a n.4 (observing that "FLPMA does not explain what the terms 'preservation,' 'wilderness,' or 'impair' mean"); *id.* at 41a (McKay, J., dissenting in part) ("The majority * * * concedes that the BLM's nonimpairment obligation is generally stated and involves a substantial amount of discretion in the manner in which the BLM meets its obligation.").

[5] Nor are SUWA's remaining claims under Section 706(1) "direct[ed] * * * against some particular 'agency action' that causes it harm." *Lujan*, 497 U.S. at 891. For example, in seeking to compel BLM to conform to its land use plans, SUWA's Second Amended Complaint refers generally to "duties and commitments to manage [off-road vehicles]," which are alleged to "include" such tasks as "the preparation of detailed [off-road vehicle] implementation plans and/or [off-road vehicle] travel plans, the preparation of maps and other informational materials for distribution to the public, the creation of monitoring plans and protocols, and the marking and signing of designated trails." Br. in Opp. App. 20; see *id.* App. 39-41, 42-43 (Third Amended Complaint). Those allegations illustrate that SUWA is seeking wide-ranging judicial intervention into BLM's day-to-day management of public lands, even down to the level of posting signs and distributing literature.

is seeking to compel under Section 706(1). The mere fact that BLM could take some "final agency action" in its management of the wilderness study areas—such as issuing a rule excluding off-road vehicles from a particular area—does not make SUWA's general claim that BLM has not prevented impairment of those areas one to compel a particular "final agency action" that has been "unlawfully withheld" within the meaning of Section 706(1). Similarly, although BLM might choose to take "final agency action" in connection with the "implementation plans" and "travel plans" called for in its land use plans, that does not make SUWA's general claim that BLM has not complied with its land use plans one to compel "final agency action."[6]

Second, SUWA errs in attempting to analogize its request to bar off-road vehicles in wilderness study areas to a request to compel final agency action. See Br. in Opp. 18. Nothing in FLPMA (or any other provision of law) requires BLM to close wilderness study areas to off-road vehicles; whether to do so is left to BLM's "considerable discretion over how it might address activity causing impairment." Pet. App. 12a (noting SUWA's concession to that effect). An injunction ordering BLM to take such action, therefore, would not direct BLM simply *to act*, but would direct BLM

[6] Perhaps in an attempt to portray its Section 706(1) claims as narrower than they actually are, SUWA focuses on the particular relief sought in its preliminary injunction motion, not on the more general claims asserted in its complaint. See, *e.g.*, Br. in Opp. 14, 17, 18. The district court, however, dismissed four of SUWA's underlying claims with prejudice, and then denied SUWA's preliminary injunction motion as moot. See *id.* App. 48-49. The court of appeals reinstated those claims. For purposes of determining whether this case raises the question presented in the petition, therefore, the Court's inquiry cannot be confined to SUWA's preliminary injunction motion, but must consider the Section 706(1) claims as alleged in SUWA's complaint. In any event, even if this case were understood to be seeking only the relief sought in the preliminary injunction motion, such relief still would not be within the scope of Section 706(1).

how to act, substituting the court's discretion for the agency's. Under Section 706(1), however, "[t]he court may require agencies to act, but may not under this provision tell them how to act in matters of administrative discretion." S. Doc. No. 248, 79th Cong., 2d Sess 40 (1946); see Pet. 15-17.

Third, SUWA's assertion that a supplemental environmental impact statement (SEIS) under NEPA "has always been treated by this Court and others as a final and challengeable action" is incorrect and unsupported by the cases on which SUWA relies. Br. in Opp. 20. None of those cases presented a freestanding claim under Section 706 to compel or to set aside a SEIS. They instead involved a challenge to a decision to undertake a "major Federal action[]," 42 U.S.C. 4332(2)(C)—the construction of a dam (*e.g.*, *Marsh* v. *Oregon Natural Res. Council*, 490 U.S. 360 (1989)) or a highway (*e.g.*, *South Trenton Residents Against 29* v. *Federal Highway Admin.*, 176 F.3d 658 (3d Cir. 1999))—on the ground, among others, that a SEIS had not been prepared. Nothing in those cases suggests that a SEIS is itself "final agency action." Rather, a SEIS is a "preliminary, procedural, or intermediate agency action" that is "not directly reviewable" under the APA, but "is subject to review on the review of the final agency action," 5 U.S.C. 704, such as the decision to proceed with the dam, highway, or other "major Federal action." See Pet. 20-22.

In any event, even if a request to compel some discrete "final agency action" were included in SUWA's claims, that would not bring the entirety of those claims within the proper scope of Section 706(1). See *Lujan*, 497 U.S. at 892-893 ("[T]he flaws in the entire 'program' * * * cannot be laid before the courts for wholesale correction under the APA, simply because one of them that is ripe for review adversely affects one of respondent's members.").

C. Finally, SUWA suggests that any "mandatory statutory duty" is enforceable under Section 706(1) in a suit such as this one. Br. in Opp. 21-25. Section 706(1), by its terms,

authorizes courts *only* to compel particular "agency action" that has been "unlawfully withheld or unreasonably delayed," not to enforce general statutory provisions standing alone. The APA contemplates the enforcement of such general provisions only in the context of judicial review of final agency action under Section 706(2). If a party such as SUWA believes that an agency should take final agency action to implement a statutory standard, the party may petition the agency for a rulemaking. See, *e.g.*, 5 U.S.C. 553(e). If the petition is denied, the party may seek judicial review under Section 706(2) based on the agency's explanation and the administrative record. And if the agency delays unreasonably in responding to such a petition, Section 706(1) may come into play to compel the agency to respond, although not how to respond. But the APA does not allow a party to bypass those orderly procedures by bringing a programmatic challenge directly in federal court.[7]

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For the reasons stated above and in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

OCTOBER 2003

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[7] SUWA appends to its brief three extra-record letters from one of its lawyers to BLM personnel. See Br. in Opp. App. 50-57. Those letters do not constitute a formal request for BLM to issue a rule closing areas to off-road vehicle use or to take other final agency action. And, even if they did, SUWA's only possible remedy under Section 706(1) would be an order to compel BLM to respond to those letters within a reasonable time.

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In the

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GALE NORTON,
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Petitioners,

v.

SOUTHERN UTAH
WILDERNESS ALLIANCE, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED FOR REVIEW

Whether the authority of the federal courts under the Administrative Procedure Act, 5 U.S.C. § 706(1), "to compel agency action unlawfully withheld or unreasonably delayed" extends to review of the adequacy of an agency's ongoing management of public lands under general statutory standards and its own land use plans.

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS CURIAE 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 4

ARGUMENT 5

I. THE TENTH CIRCUIT'S INTERPRETATION OF APA SECTION 706 FAILS TO RECOGNIZE THE PURPOSE AND STRUCTURE OF THE ACT 5

A. The APA Does Not Give License to a Private Party to Litigate Everything the Administrative Agencies Do, but Does Allow Judicial Review in Limited, Specific Instances 5

B. Activities Relied on by the Tenth Circuit Are Not Agency Actions as Defined by the APA ... 7

C. The Tenth Circuit's Reliance on "Inaction" to Find "Finality" for APA Purposes is Misplaced 9

II. THE TENTH CIRCUIT'S FORMULATION WILL RESULT IN THE USURPATION OF THE ADMINISTRATIVE PROCESS BY THE JUDICIARY AND IN ADMINISTRATIVE PARALYSIS 13

CONCLUSION 16

TABLE OF AUTHORITIES

Page

Cases

Abbott Labs. v. Gardner, 387 U.S. 136 (1967). 11

Bennett v. Spear, 520 U.S. 154 (1997) 1, 7, 9-10

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 1

Federal Trade Commission v. Standard Oil Co. of California, 449 U.S. 232 (1980) 7

Franklin v. Massachusetts, 505 U.S. 788 (1992) 9

Home Builders Association of Greater Chicago v. United States Army Corps of Engineers, 335 F.3d 607 (7th Cir. 2003) 7

Lujan v. National Wildlife Federation, 497 U.S. 871 (1990) 1, 5, 7-9, 12, 15

Ohio Forestry Ass'n, Inc. v. Sierra Club, 523 U.S. 726 (1998) 1, 15

Public Lands Council v. Babbitt, 529 U.S. 728 (2000) 15

Robertson v. Methow Valley Citizens Council, 490 U.S. 332 (1989) 1

Southern Utah Wilderness Alliance v. Norton, 301 F.3d 1217 (10th Cir. 2002) 3, 7, 10-11, 14-15

Statutes

5 U.S.C. § 551 6

§ 551(4) 6

TABLE OF AUTHORITIES—Continued

Page

§ 551(5) 6

§ 551(7) 6

§ 551(13) 7-8, 12

§ 552(a)(2) 6

§ 553(b) 6

§ 553(c) 6

§ 554 6

§ 701 6-8

§ 701, *et seq.* 1

§ 701(b)(2) 6

§ 702 6-7

§ 704 ..... 6-7, 9-10

§ 706 6

§ 706(1) ..... passim

§ 706(2) 6

§ 706(2)(a) 7

42 U.S.C. § 4321, *et seq.* 3

§ 4332(2)(c) 3

43 U.S.C. § 1701, *et seq.* 2

§ 1712(a) 2

Healthy Forests Restoration Act of 2003, Pub. L. No. 108-148, 117 Stat. 1887 14

TABLE OF AUTHORITIES—Continued

Page

Regulations

40 C.F.R. § 1502.9(c)(1) (2003) 3

44 Fed. Reg. 72,014 2

Miscellaneous

DeLong, James V., *New Wine for a New Bottle: Judicial Review in the Regulatory State*, 72 Va. L. Rev. 399 (1986) 13

Rubin, Edward, *It's Time to Make the Administrative Procedure Act Administrative*, 89 Cornell L. Rev. 95 (2003) 7, 12

Rehnquist, Chief Justice William H., *2002 Year-End Report on the Federal Judiciary*, *at* www.supremecourtus.gov/publicinfo/year-end/2002year-endreport.html (Jan. 1, 2003) 14-15

INTEREST OF AMICUS CURIAE

Pacific Legal Foundation (PLF)[1] is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. Over 25,000 individuals, organizations, and associations support PLF's efforts nationwide. PLF has participated in numerous cases concerning the authority of administrative agencies to exercise the discretion delegated to them under acts of Congress and the appropriateness of judicial review of administrative agency actions under the Administrative Procedure Act (APA), 5 U.S.C. § 701, *et seq.* For example, PLF participated as amicus curiae before this Court in *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726 (1998) (*Ohio Forestry*), *Bennett v. Spear*, 520 U.S. 154 (1997) (*Bennett*); *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990) (*Lujan*), *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332 (1989), and *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

Amicus seeks to augment the argument of Petitioners' brief by discussing how the statutory scheme set out under the APA reflects Congress's intent to permit judicial review of *administrative actions* taken by agencies relating to rulemaking or adjudication. Environmental Respondents should not be allowed to disregard this important, but limited, application of the APA and turn our courts into day-to-day managers of our public resources. PLF believes that its previous litigation experience with respect to the APA will provide an additional viewpoint with respect to the constitutional and legal issues presented. Pursuant to Supreme Court Rule 37, written

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[1] Pursuant to Supreme Court Rule 37.6, Amicus Curiae Pacific Legal Foundation affirms that no counsel for any party in this case authored this brief in whole or in part; and furthermore, that no person or entity has made a monetary contribution specifically for the preparation or submission of this brief.

permission from all parties for PLF to file this brief has been lodged with the Clerk of the Court.

STATEMENT OF THE CASE

Environmental Respondents are of the opinion that the Bureau of Land Management (BLM) is ineffectively managing our nation's natural resources—particularly potential wilderness areas. Respondents worry that due to the BLM's failure to engage in a more proactive program to keep off-road vehicles out of potential wilderness areas, Congress will not be inclined to designate these areas as wilderness in the future. Under the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. § 1701, *et seq.*, BLM must manage areas that have the potential to be congressionally designated as wilderness areas in a manner that does not "impair" such designation. The BLM's "interim management policy" for the wilderness study areas, however, does not require that the lands be managed as though they had already been designated as wilderness. 44 Fed. Reg. 72,014, 72,016 (1979). The BLM retains discretion as to the development and implementation of the policy.

Respondents also claim the BLM has only partially implemented its land use plans developed for the potential wilderness and surrounding areas. Under the FLPMA, the BLM must prepare land use plans, and the BLM's own regulations require that it adhere to the terms, conditions, and decisions of officially approved plans. The plans included provisions for monitoring of off-road vehicle activity in the area surrounding the study units and development and implementation of off-road vehicle management plans. The BLM, however, has the discretion to revise the land use plans "as appropriate." 43 U.S.C. § 1712(a). At the time litigation began, the BLM was engaged in the ongoing implementation of these plans.

Finally, Respondents allege that, since there has been an increase in off-road vehicle activity in and around the

wilderness study areas, a revision of the existing environmental documents is in order. Under the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321, *et. seq.*, federal agencies must prepare environmental reviews for proposals for legislation and other major federal actions significantly affecting the quality of the human environment. 42 U.S.C. § 4332(2)(c). Environmental reviews must be updated or supplemented in cases when a substantial change on a proposed action occurs, or when there are significant new circumstances or information relevant to the environmental concerns that bear on the proposed action or its impacts. 40 C.F.R. § 1502.9(c)(1) (2003).

In order to compel a more forceful "potential wilderness protection program," Respondents relied on Section 706 of the APA, 5 U.S.C. § 551, *et seq.*, to challenge BLM's "inaction" to comply with the nonimpairment mandate. They also used the APA to challenge the BLM's failure to completely implement its off-road vehicle management plan, as identified in the land use plans. Additionally, the groups argued that the BLM failed to consider whether a new environmental document was needed due to the increased off-road vehicle traffic around the wilderness study areas.

The district court dismissed the claims. *Southern Utah Wilderness Alliance v. Norton*, 301 F.3d at 1222 (10th Cir. 2002) (*SUWA*). On appeal, the Tenth Circuit reversed, holding that, under APA Section 706(1), the claims were proper. The court reasoned that the BLM had mandatory, nondiscretionary duties to (1) manage the wilderness study areas in accordance with the FLPMA's nonimpairment mandate, (2) deal with off-road vehicle use as outlined in the land use plans, and (3) take a "hard look" at whether a supplemental environmental document was needed. Thus, any failure to take steps to accomplish these mandates was "an agency action" reviewable by the court under the APA.

This Court agreed to determine whether APA Section 706(1) allows judicial review of actions that are neither agency actions as defined by the APA, nor final. Amicus will address how the Tenth Circuit's impermissible expansion of the scope of judicial review results from a failure to correctly interpret Section 706's role in the overall statutory scheme.

SUMMARY OF ARGUMENT

This case deals with an attempt by environmental groups to take full command of the Bureau of Land Management's (BLM) administration of its programs because they are unhappy with the way the BLM implements these programs. To accomplish this, environmental litigants are using the APA as their weapon of choice.

The APA is not a license for the courts to review and redirect any and all agency acts. The judicial review authorization under the APA applies only in certain, limited circumstances. To determine when review is appropriate, the nature of the administrative action involved is key. Unless there is other statutory authority, the agency action under review must be linked with the APA's rulemaking or adjudication processes. It must result in a rule, order, license, sanction, relief, or the equivalent or denial thereof. An agency's failure to take steps is reviewable if related to the type of agency action contemplated by the APA. Only in such situations does the APA provide an avenue for private citizens to challenge agency activities.

In addition, where a specific statute does not authorize judicial review of an agency action, Congress has provided for such review under the APA *only when* the administrative action under scrutiny is determined to be "final" in nature. To determine finality, this Court asks whether the agency has completed its decisionmaking process and whether the result of that process is one that will directly affect the parties. Only where this "finality" test is met—assuming other Section 701

requirements are complied with—can a private party ask the court to determine whether it is appropriate to compel an agency to act a certain way under Section 706(1).

By disregarding the judicial review limitations found in the APA, the Tenth Circuit impermissibly turns its back on congressional mandates. The result is that under the Tenth Circuit's analysis, any agency activity now becomes fodder for litigation under the APA even when such activity does not involve rulemaking or adjudication processes. The decision turns statements of program ideals into judicially enforceable obligations that override the judgment of the administrative agency that has been delegated with the task of turning goals into reality. This is contrary to the premise that environmental Respondents "cannot seek *wholesale* improvement of this program by court decree, rather than in the offices of the Department or the halls of Congress, where programmatic improvements are normally made." *Lujan*, 497 U.S. at 891. It is also contrary to constitutional prohibitions against the usurpation of the executive powers by the judiciary.

ARGUMENT

I

THE TENTH CIRCUIT'S INTERPRETATION OF APA SECTION 706 FAILS TO RECOGNIZE THE PURPOSE AND STRUCTURE OF THE ACT

A. The APA Does Not Give License to a Private Party to Litigate Everything the Administrative Agencies Do, but Does Allow Judicial Review in Limited, Specific Instances

One need only look at the structure of the APA to decipher that the Act's judicial review provisions apply only to certain, limited instances. For the present determination, the most relevant sections of the APA are those defining terms under the APA, those dealing with procedural requirements for administrative agencies, and those dealing with the judicial

review of agency actions. 5 U.S.C. §§ 551, 552(a)(2), 553(b), (c), 554, 701, 702, 704. Judicial review under the APA, and the scope of that review, are addressed in the Judicial Review Chapter—Sections 701 through 706. Section 701(b)(2) states that for purposes of this chapter, the terms "agency action," "rule," "order," "license," "sanction," and "relief" have the meanings given to them by Section 551 of the APA. Section 551(13) defines "agency action" to include the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or a failure to act. Section 551(5) defines "rulemaking" to mean an agency process for formulating, amending, or repealing a rule. A "rule" is defined as an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency. 5 U.S.C. § 551(4). Section 551(7) defines "adjudication" to mean an agency process for the formulation of an order.

Section 704 permits a federal court to consider any "agency action" if expressly authorized in a statute, or any "final agency action" dealing with a rulemaking or adjudication (order, license, sanction, or relief) as long as there is no other adequate remedy in a court. Preliminary and other nonfinal agency action is reviewable "on the review of the final agency action." 5 U.S.C. § 704. If the action is reviewable, then Section 706 indicates the scope of that review, which allows the compelling of an agency action unlawfully withheld or unreasonably delayed, or the setting aside actions that are unlawful due to a number of factors. 5 U.S.C. § 706(1), (2).

Only when the claim meets all the requirements described above can a court, guided by Section 706, apply the appropriate standard of review depending on the remedy sought. *Id.* at 884; *Bennett*, 520 U.S. at 175-79 (allowing claim for relief under Section 706(2)(a) to proceed only after determination that Sections 701, 702, and 704 requirements had been met);

Federal Trade Commission v. Standard Oil Co. of California, 449 U.S. 232, 238 n.7 (1980) (*Standard Oil Co.*) (request to withdraw administrative complaint under Section 706 not reviewable under Section 704); *Home Builders Association of Greater Chicago v. United States Army Corps of Engineers*, 335 F.3d 607, 614 (7th Cir. 2003) (*Greater Chicago*) (claim for injunctive relief under Section 706(2) allowed to proceed because Sections 701, 702, and 704 requirements were met). Thus, under the APA, private parties can communicate their views regarding rulemaking and adjudication to the agency decisionmakers and challenge in court the *legality of the rulemaking or adjudication*. Edward Rubin, *It's Time to Make the Administrative Procedure Act Administrative*, 89 Cornell L. Rev. 95, 101 (2003).

B. Activities Relied on by the Tenth Circuit Are Not Agency Actions as Defined by the APA

The Tenth Circuit gives a broad reading to Section 706(1), which states that a court "shall" "compel agency action unlawfully withheld or unreasonably delayed," and concludes that it has jurisdiction to review any action by the BLM. *SUWA*, 301 F.3d at 1228-29. The court's approach misconstrues the scope of judicial review under the APA by reading the definition of "agency action" under Section 551(13) out of the context of the statute. The court failed to apply the canon of statutory interpretation that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme. It treats Section 706(1) as if it existed in an analytical vacuum, unconnected to the other sections in the Act that delineate what actions are opened to judicial review.

"Under the terms of the APA, Respondent must direct its attack against some particular 'agency action' that causes harm." *Lujan*, 497 U.S. at 891. Section 701 clearly states that the judicial review chapter applies to "agency actions" as defined by the APA. Section 551(13) defines "agency action"

to include the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or a failure to act.

None of the allegations made by environmental Respondents, and reviewed by the Tenth Circuit, deal with an "agency action" as defined by Section 551(13). There are no allegations that the BLM authorized via rulemaking off-road vehicle use in the wilderness study areas, or that the BLM licensed off-road vehicle use, or that the BLM authorized via rulemaking the use of the wilderness study areas in a manner that "impaired" them, or that the BLM approved activities that are contrary to the wilderness study areas land use plans. Nor are there allegations that the BLM "granted relief" to those caught using the areas in a nonconforming manner. The failures to act alleged do not involve the failure to take an action with regard to the making of a rule, the issuance of an order, the granting of a license, the imposition of a sanction, or the granting of relief.

Furthermore, the environmental Respondents make no allegations that violations of law occurred in the designation of wilderness study areas, in the development of land use plans, in the development of the "nonimpairment" policy, or in the development of the environmental impact statements for each wilderness study area. Nor do they allege that the procedures employed as part of these decisions were flawed. Since none of the activities challenged by the Respondents fit the Section 551(13) definition of agency action, they simply are not reviewable by the court under the APA.

The only "actions" under challenge here are the BLM's day-to-day administration of public lands in a way that does not comport to the "procedures" the environmental Respondents would prefer. Without a specific authorization of Congress to make such challenges (which does not exist here), adjudication of claims based on dissatisfaction with the BLM's management

procedures are not justiciable under the APA. Thus, unless Respondents can point to some other "specific order or regulation, applying some particular measure across the board" to all wilderness study areas, they have failed to identify an "agency action" reviewable under the APA. *Lujan*, 497 U.S. at 890 n.2.

C. The Tenth Circuit's Reliance on "Inaction" to Find "Finality" for APA Purposes is Misplaced

As noted above, Section 704 permits a federal court to review a "final agency action" dealing with a rulemaking or adjudication (order, license, sanction, or relief) as long as there is no other adequate remedy in a court. In *Bennett*, this Court articulated a test to determine finality under Section 704.

> As a general matter, two conditions must be satisfied for agency action to be "final": First, the action must mark the "consummation" of the agency's decisionmaking process . . . —it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights and obligations have been determined, or from which legal consequences will flow.

Bennett, 520 U.S. at 177-78 (citation omitted). Accordingly, "[t]he core question is whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties." *Franklin v. Massachusetts*, 505 U.S. 788, 797 (1992). Thus, when a private party challenges a final, specific decision related to the APA's rulemaking or adjudicatory process, there is no difficulty meeting the "final agency action" requirement under Section 704. The party can point to the completion of the agency's decisionmaking process, and he can identify how the decision resulted in some form of concrete harm.

The Tenth Circuit's decision does find that the BLM's actions are "final," but this conclusion is not anchored on the finality requirements set forth in *Bennett*. To find a final agency action, the Tenth Circuit accepts Respondents' characterization that a failure to meet general programmatic goals are "final agency actions" for APA review purposes. *SUWA*, 301 F.3d at 1229, 1235, 1239. This approach turns unauthorized off-road vehicle use on federal lands that had been classified by the BLM as wilderness study areas into a "final agency action" reviewable under the APA. *SUWA*, 301 F.3d at 1229. Similarly, a failure to complete implementation of all activities identified in the land use plans associated with the wilderness study areas becomes reviewable under the APA. *Id.* at 1235 ("[T]he failure to implement a program specifically promised in [a land use plan] carries the same effect as if the agency had taken an 'affirmative' or 'future' action in direct defiance of its [land use plan] obligations.").

Under *Bennett*, the BLM's alleged failure to meet the broad statutory nonimpairment obligations under the Federal Land Policy and Management Act or the land use plans does not constitute a "final agency action" that can be reviewed by the court under the section 706(1) scope. As noted above, there are no allegations that the BLM authorized the use of off-road vehicles in the wilderness study areas, or that the BLM licensed off-road vehicle use, or that the BLM approved activities in wilderness study areas that would "impair" them, or that the BLM approved activities that are contrary to the wilderness study areas' land use plans. Thus, there are no allegations that point to a "final agency action"—that is, the completion of an agency's decisionmaking process resulting in a decision either determining the rights and obligations of Respondents, or from which legal consequences flow. [2]

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[2] The Tenth Circuit's decision also clashes with this Court's prudential concerns that disputes too hypothetical and speculative to (continued...)

Finally, the court below expressed a concern that, unless the BLM is compelled to take steps to meet Respondents' concept of the FLPMA's nonimpairment and land use plan mandates, a "no-man's-land" of judicial review would be created "in which a federal agency could flout mandatory, nondiscretionary duties simply because it might be able to satisfy these duties through some form of non-final action." *Id.* at 1230 n.10. Realistically, though, agency efforts to satisfy mandatory duties imposed by Congress will sooner or later lead to some agency decision having legal consequences, or creating rights or obligations. If these decisions in effect violate mandatory, nondiscretionary agency duties, reviewability under the APA may follow. Furthermore, Congress has made it clear that not all agency actions are subject to judicial review under the APA. Section 701(a) expressly forbids judicial review of any agency action under two specific circumstances: when a statute precludes such a review or when Congress has

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[2] (...continued)
permit judicial review be avoided. The ripeness doctrine is designed "to prevent courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967). Because the Tenth Circuit's decision simply disregards the need for the agency action under review to be final in nature, it also ignores the prudential jurisdictional boundaries set by the ripeness doctrine. The perils of such entanglements are not lost on the dissenting judge, who expressed concern that the majority's misguided generosity leaves the district court with no way of determining an appropriate remedy. *SUWA*, 301 F.3d at 1243 ("On remand, I can think of no remedy the district court could construct that would guarantee a correction of the agency failure alleged .... At most and at worst, the remedy granted would involve the district court in the ongoing review of every management decision allegedly threatening achievement of the nonimpairment mandate.").

committed the agency action to agency discretion. Thus, concerns regarding the existence of a "no-man's land" of agency activity not opened to judicial review fail to account for the fact that Congress has expressly acknowledged an intent not to allow judicial review of certain agency activities.

In summary, the APA limits "[private parties'] role to the ambit of particular agency decisions—to the rule on which they are commenting, the adjudication in which they are making an appearance, or the agency action that they are challenging in court." Rubin, *supra*, 89 Cornell L. Rev. at 103. The APA permits private parties to participate in the policy and management processes either through the rulemaking or adjudication schemes set out in the Act. Once the rulemaking or adjudication process ends, private parties can challenge the action under the judicial review section of the Act if the agency action is (1) final in nature and (2) violates federal law or the Constitution. Because Respondents cannot point to a single BLM order, regulation, license, sanction, relief, or the equivalent or denial thereof, or even to a completed universe of particular BLM orders and regulations, licenses, sanctions, etc., issued in violation of the "non-impairment" mandate or land use plans, the BLM's activities are not reviewable under the APA. *Lujan*, 497 U.S. at 890.

II

THE TENTH CIRCUIT'S FORMULATION WILL RESULT IN THE USURPATION OF THE ADMINISTRATIVE PROCESS BY THE JUDICIARY AND IN ADMINISTRATIVE PARALYSIS

The Tenth Circuit's approach impermissibly places the judiciary at the center of the administrative realm reserved for the executive branch. It does so through an expansive interpretation of the APA that allows judicial review of general programmatic goals, and converts them into enforceable obligations. This in turn empowers interest groups to turn to the courts to prioritize the BLM's management activities. Administrative paralysis will result as the bureau tries to enforce what will likely be conflicting court mandates.

The Tenth Circuit anchors its decision on a number of broad statutory duties requiring the BLM to manage its resources in accordance with the nonimpairment requirement or in accordance with land use plans. General statements of purposes or goals, similar to those found in the FLPMA, are customary in legislation and "are part of the motherhood-and-apple-pie of politics, and everyone knows that the statements represent ideals, not plans." James V. DeLong, *New Wine for a New Bottle: Judicial Review in the Regulatory State*, 72 Va. L. Rev. 399, 435 (1986). Congress enacts high sentiments into law precisely because such pronouncements do not create enforceable obligations. "Before these sentiments are translated into real claims on government and society, Congress must go through the additional process of establishing the administrative machinery and appropriating the money to carry them out." *Id.*

Correctly viewed, then, "the BLM's land plans are aspirational . . . [and] the BLM is not required to meet each and every specific goal set forth in its land use plans or face potential litigation jurisdictionally based on § 706(1) for failing

to act." *SUWA*, 301 F.3d at 1245 (McKay, J., dissenting). Yet, the Tenth Circuit's decision, if allowed to stand, turns aspirational statements of program ideals into enforceable obligations—without regard to the administrative agency that has been delegated the task of turning goals into reality. "[A] host of mandatory, ongoing, continuous agency obligations [become] subject to attack pursuant to the majority's view of § 706(1) jurisdiction." *Id.* at 1242 n.3 (McKay, J., dissenting)

The BLM will face unprecedented paralysis as it tries to enforce conflicting court mandates. One court at the request of environmentalists can apply the Tenth Circuit's reasoning to justify issuing an order forcing the BLM to limit mechanized access into lands adjacent to wilderness study areas. At the same time, another court, applying the same reasoning and in response to requests of property owners, may issue an order compelling the BLM to allow such mechanized access to meet the hazardous fuel reduction requirements under the newly-enacted Healthy Forests Restoration Act of 2003, Pub. L. No. 108-148, 117 Stat. 1887, on the basis that the law requires "the Secretary [of the Interior] shall implement authorized hazardous fuel reduction projects in . . . Federal land in wildland-urban interface areas." *Id.*

Judicial intervention in the administrative process threatens unmitigated gridlock at the district court level, as every interest group grabs ahold of the APA to demand that trial courts second-guess the day-to-day activities of federal agencies. It is important to recognize that, while a plaintiff using this approach may not succeed on the merits, the judicial and executive branches will nonetheless suffer[3] under the

[3] The increase of litigation that will likely flow from the expansion of activities reviewable under the APA further burdens an already underfunded and understaffed federal judicial system. *See Rehnquist, Chief Justice William H., 2002 Year-End Report on the* (continued...)

litigation onslaught that will result if the Tenth Circuit's decision is not overturned.[4]

Through the years, PLF attorneys have represented the public interest with respect to the implementation of congressionally approved mandates to manage our nation's public lands for multiple uses that take human interests into account. We have participated in challenges, via the APA, of agencies' failure to implement final decisions which permit grazing, recreational access, mineral extraction, and timber harvesting. *See Public Lands Council v. Babbitt*, 529 U.S. 728 (2000). Other times, we have stood side-by-side with the administrative agencies as they fought attempts by environmental groups to use the APA in efforts to curb the management of public lands for multiple uses. *See Ohio Forestry*, 523 U.S. at 118; *Lujan*, 497 U.S. at 871.

As tempting as it may be to join the Respondents' attempt at expanding the application of the APA to authorize judicial challenge to activities of all kinds, we recognize that such an approach can only, in the long run, cause more harm than good. Opening the litigation door will result in a system paralysis in the management of our nation's administrative framework never before experienced. It will result in an unbalancing of the constitutional division of powers that will cause great disruption in our executive and judicial branches. It is critical that this Court not permit such disruption to occur.

[3] (...continued)
Federal Judiciary, at www.supremecourtus.gov/publicinfo/year-end/2002year-endreport.html (Jan. 1, 2003.)

[4] This concern is expressed by the dissent: "However narrowly intended, the court's opinion has opened the floodgates of litigation for plaintiffs to challenge any mandatory agency obligation regardless of the amount of discretion afforded to the agency in carrying out its obligations." *SUWA*, 301 F.3d at 1246 (McKay, J., dissenting).

CONCLUSION

The Tenth Circuit's interpretation of APA Section 706 is inconsistent with the purpose and structure of the Act, and results in the judicial review of agency activities that would otherwise not be reviewable under the APA. For these reasons, this Court should reverse the decision of the court below.

DATED: January, 2004.

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IN THE

Supreme Court of the United States

GALE NORTON, Secretary of the Interior, *et al.*,

Petitioners,

v.

SOUTHERN UTAH WILDERNESS ALLIANCE, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

AMICI CURIAE BRIEF OF DEFENDERS OF WILDLIFE AND PUBLIC CITIZEN IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

	Page
TABLE OF CITED AUTHORITIES	ii
INTEREST OF THE AMICI CURIAE	1
SUMMARY OF THE ARGUMENT	3
ARGUMENT	4
I. A Claim Brought Under The "Unreasonably Delayed" Prong Of Section 706(1) Does Not Depend On A Separate Mandatory Statutory Obligation To Undertake The Particular Action.	4
II. The BLM's Obligation To Prepare A Supplemental EIS Stems From A Mandatory Duty Imposed By The Binding Council On Environmental Quality Regulations.	10
CONCLUSION	15

TABLE OF CITED AUTHORITIES

FEDERAL CASES

Page

Andrus v. Sierra Club,
442 U.S. 347 (1979) 10

California Department of Health Services v. Babbitt,
46 F. Supp. 2d 13 (D.D.C. 1999) 13

Cobell v. Norton,
240 F.3d 1081 (D.C. Cir. 2001) 7

Corridor H Alternatives, Inc. v. Slater,
166 F.3d 368 (D.C. Cir. 1999) 13, 14

Cutler v. Hayes,
818 F.2d 879 (D.C. Cir. 1987) 8

Friends of Yosemite Valley v. Norton,
194 F. Supp. 2d 1066 (E.D. Cal. 2002) 14

General Motors Corp. v. United States,
496 U.S. 530 (1990) 5, 6

Grand Canyon Air Tour Coalition v. FAA,
154 F.3d 455 (D.C. Cir. 1998) 8

In re International Chemical Workers Union,
958 F.2d 1144 (D.C. Cir. 1992) 7

Cited Authorities

Page

Interstate Natural Gas Association of America v. FERC,
285 F.3d 18 (D.C. Cir. 2002) 6, 8

Jenkins v. McKeithen,
395 U.S. 411 (1969) 11

Jersey Heights Neighborhood Association v. Glendening,
174 F.3d 180 (4th Cir. 1999) 14

Marsh v. Oregon Natural Resources Council,
490 U.S. 360 (1989) 12, 14

Mashpee Wampanoag Tribal Council, Inc. v. Norton,
336 F.3d 1094 (D.C. Cir. 2003) 6

Ohio Forestry Association v. Sierra Club,
523 U.S. 726 (1998) 12

Oil, Chemical and Atomic Workers Intern. Union v. Zegeer,
768 F.2d 1480 (D.C. Cir. 1985) 7

Potomac Electrical Power Co. v. ICC,
702 F.2d 1026 (D.C. Cir. 1983) 6

Public Citizen Health Research Group v. Auchter,
702 F.2d 1150 (D.C. Cir. 1983) 7

Page

Public Citizen Health Research Group v. Chao,
314 F.3d 143 (3d Cir. 2002) 6

Public Citizen Health Research Group v. Commissioner, Food and Drug Administration,
740 F.2d 21 (D.C. Cir. 1984) 7

Sierra Club v. Slater,
120 F.3d 623 (6th Cir. 1997) 14

Sierra Club v. Thomas,
828 F.2d 783 (D.C. Cir. 1987) 9

Sierra Club v. Watkins,
808 F. Supp. 852 (D.D.C. 1991) 10

Southern Utah Wilderness Alliance v. Norton,
301 F.3d 1217 (10th Cir. 2002) 4

Telecommunications Research & Action v. F.C.C.,
750 F.2d 70 (D.C. Cir. 1984) 8

United Steelworkers of America v. Pendergrass,
819 F.2d 1263 (3rd Cir. 1987) 7

US Ecology, Inc. v. United States Department of the Interior,
231 F.3d 20 (D.C. Cir. 2000) 13

Page

Valley Community Preservation Commission v. Mineta,
231 F. Supp. 2d 23 (D.D.C. 2002) 13

Warth v. Seldin,
422 U.S. 490 (1975) 11

FEDERAL STATUTES

5 U.S.C. § 555(b) ..... *passim*

5 U.S.C. § 706(1) ..... *passim*

5 U.S.C. § 706(2) 1, 12

42 U.S.C. § 4321, *et seq.* 1, 3, 10

42 U.S.C. § 4332(2)(C) 10

42 U.S.C. § 7410(a)(2) 6

43 U.S.C. § 1732(a) 5

43 U.S.C. § 1782(c) 5

Cited Authorities

	Page
FEDERAL REGULATIONS	
40 C.F.R. §§ 1500-1508	1
40 C.F.R. § 1500.1	10
40 C.F.R. § 1500.1(c)	10
40 C.F.R. § 1502.1	11, 13
40 C.F.R. § 1502.9(c)(1)(ii)	2
40 C.F.R. § 1502.9(c)(ii)	3, 11
40 C.F.R. § 1505.2	12, 13, 14
40 C.F.R. § 1505.9	13
40 C.F.R. § 1508.18(a)	11

INTEREST OF THE AMICI CURIAE[1]

Defenders of Wildlife is a non-profit organization dedicated to the protection of native animals and plants in their natural communities. It focuses its actions on curtailing two of the most serious environmental threats to the planet: the accelerating rate of extinction of species, and habitat alteration and destruction. Defenders of Wildlife has thousands of members who regularly enjoy recreating in the areas administered by the Bureau of Land Management that are at issue in this case.

Defenders of Wildlife also regularly relies on the judicial review provisions of the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 706(1), (2), and the requirements of the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321, *et seq.*, as well as the Council on Environmental Quality's binding regulations, 40 C.F.R. §§ 1500-1508, in bringing cases in federal court to ensure compliance with laws enacted to protect the environment.

Public Citizen, Inc., is a non-profit advocacy group with approximately 160,000 members nationwide. It appears before Congress, administrative agencies, and the courts on a wide range of issues. Prominent among Public Citizen's concerns is combating regulatory delay, particularly in the promulgation of critically important public health and safety regulations (for example, delays by the Occupational Safety and Health Administration in promulgating workplace safety

1. None of the attorneys for the parties in this case authored any of this *amici* brief, and no one other than *amici* made any monetary contribution to the preparation or submission of the brief. *Amici* have received the written consent of the parties to file this brief, and such consents are being lodged herewith.

and health standards, and delays by the Food and Drug Administration in protecting the public from adverse effects of prescription and over-the-counter drugs).

In pursuit of this objective, Public Citizen has, too often, found it necessary to invoke section 706(1) of the APA to challenge unreasonable delay by agencies in concluding matters before them – delay that often is measured in years, if not decades. Indeed, many of the unreasonable delay cases cited later in this brief were filed by Public Citizen lawyers. Public Citizen is therefore vitally concerned that the availability of the APA as a tool to counter extreme agency delays not be limited by the Court's decision in this case.

Defenders of Wildlife and Public Citizen (hereinafter collectively referred to as "*Amici*") are submitting this *amicus* brief for two reasons. First, *Amici* wish to ensure that, in reviewing the narrow issues under review, this Court does not inadvertently adopt a view of the scope of the "unreasonable delay" prong of section 706(1) that, although not implicated in this particular case or necessary for the Court's review, is nevertheless misstated in the brief that has been submitted by the government. Second, *Amici* wish to clarify that the agency's duty in this case to prepare a Supplemental Environmental Impact Statement ("SEIS") stems from the requirement in the binding Council on Environmental Quality ("CEQ") regulations that all agencies "shall prepare" an SEIS – and make a judicially reviewable decision as to whether additional environmentally protective measures are required – whenever "[t]here are significant new circumstances or information relevant to the environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. § 1502.9(c)(1)(ii).

SUMMARY OF THE ARGUMENT

I. Because the Administrative Procedure Act, 5 U.S.C. § 555(b), requires agencies to conclude proceedings "within a reasonable time," and it further provides that a federal court "shall . . . compel agency action . . . unreasonably delayed," 5 U.S.C. § 706(1), a plaintiff with Article III standing may bring a claim challenging an agency's failure to conclude an agency proceeding within a reasonable time, whether or not the agency has a mandatory obligation under an *additional* statute to undertake that particular proceeding.

II. The binding regulations of the Council on Environmental Quality ("CEQ") require an agency to prepare a Supplemental Environmental Impact Statement ("SEIS") pursuant to the National Environmental Policy Act, 42 U.S.C. § 4321, *et seq.*, whenever "there are significant new circumstances or information relevant to the environmental concerns and bearing on the proposed action or its impacts," 40 C.F.R. § 1502.9(c)(ii), and the CEQ regulations further require that, if such circumstances are present, the agency must, in connection with the preparation of the SEIS, also issue a "Record of Decision" as to whether, and to what extent, the agency will modify its action to take such new information into account. Therefore, a federal court may entertain a plaintiff's claim, pursuant to 5 U.S.C. § 706(1), that the agency has failed to prepare the requisite SEIS.

ARGUMENT

I. A Claim Brought Under The "Unreasonably Delayed" Prong Of Section 706(1) Does Not Depend On A Separate Mandatory Statutory Obligation To Undertake The Particular Action.

Section 706 of the APA provides that a reviewing court "*shall* . . . compel agency action unlawfully withheld *or unreasonably delayed*." 5 U.S.C. § 706(1) (emphasis added). In the course of ruling that the plaintiffs in this case adequately pled a claim for relief under this provision, the Court of Appeals for the Tenth Circuit stated that "[u]nder either the 'unreasonably delayed' or 'unlawfully withheld' prongs of § 706(1), federal courts may order agencies to act *only where the agency fails to carry out a mandatory, nondiscretionary duty*," and that "[b]y contrast, *if a duty is not mandated*, or if an agency possesses discretion over whether to act in the first instance, *a court may not grant relief under § 706(1)*." 301 F.3d 1217, 1226 (10th Cir. 2002) (emphasis added). In its brief to this Court, the government states that Section 706(1) is only available "to compel a discrete final action *that an agency is required by law to take or complete*." Government's Brief ("Gov't Brf.") at 24 (emphasis added).

These statements concerning the scope of Section 706(1) may properly apply to actions seeking to compel agency action "unlawfully withheld." Furthermore, in this case, plaintiffs have certainly asserted that the Bureau of Land Management ("BLM") *does* have a mandatory duty under the Federal Land Management Act to "manage" Wilderness Study Areas "in a manner so as not to impair the suitability of such areas for preservation as wilderness,"

43 U.S.C. § 1782(c), and also to "manage the public lands . . . in accordance with the [agency's] land use plans," 43 U.S.C. § 1732(a). *See* Second Amended Complaint, Claims Five and Six. However, under long standing precedent, an agency need not have a mandatory duty, independent of the APA, to take some particular action in order for plaintiffs to properly allege a claim under § 706(1) that an agency has "*unreasonably delayed*" taking that action.

On the contrary, because the APA itself imposes a separate obligation on all agencies to conclude matters "within a reasonable time," 5 U.S.C. § 555(b), there is no *additional* requirement that a plaintiff alleging a violation of this command point to some other mandatory statutory duty to undertake the particular action at issue. Rather, whether the agency has a mandatory duty under its organic statute to take a particular action, or has been petitioned by a member of the public to undertake a *discretionary* action, or the agency itself has decided to undertake such an action in the exercise of its statutory authority, a plaintiff with Article III standing may challenge the agency's failure to complete any such undertaking "within a reasonable time." And, if the court agrees that the delay is "unreasonable," then it "shall" compel the agency to make a final decision, one way or another, 5 U.S.C. §§ 555(b), 706(1).

As this Court observed in *General Motors Corp. v. United States*, 496 U.S. 530, 539 (1990), section 555(b) of the APA itself imposes this "mandate" on agencies, since the public affected by agency proceedings – whether rulemaking, licensing, or ratemaking – has an overriding interest in having ongoing proceedings brought to some conclusion "within a reasonable time," so that the affected public is not indefinitely

left in limbo as to an agency's intentions. As the Court of Appeals for the D.C. Circuit has explained, "quite simply, excessive delay saps the public confidence in an agency's ability to discharge its responsibilities and creates uncertainty for the parties, who must incorporate the potential effect of possible agency decisionmaking into future plans." *Potomac Elec. Power Co. v. ICC*, 702 F.2d 1026, 1034 (D.C. Cir. 1983).

Indeed, in *General Motors*, this Court recognized that, pursuant to section 555(b), the Environmental Protection Agency must approve a state's revised implementation plan under the Clean Air Act "within a reasonable time," once the agency determines that the state's revision meets the substantive requirements of the underlying statute, despite the fact that the EPA has a great deal of discretion under the statute to determine *whether* the state has met those requirements. *General Motors*, 496 U.S. at 539-41; *see also e.g.*, 42 U.S.C. § 7410(a)(2) (state implementation plans shall provide for "appropriate" devices, methods, systems, and procedures "necessary" to monitor data on ambient air quality); *see also Mashpee Wampanoag Tribal Council, Inc. v. Norton*, 336 F.3d 1094, 1099-1100 (D.C. Cir. 2003) (district court has jurisdiction pursuant to 5 U.S.C. §§ 555(b), 706(1), to decide whether agency has unreasonably delayed processing putative tribe's petition for recognition); *Public Citizen Health Research Group v. Chao*, 314 F.3d 143, 150-51 (3d Cir. 2002) (recognizing that section 706(1) creates a right of action to review unreasonable delay in promulgation of OSHA occupational exposure standards despite agency's "quintessential discretion" to allocate resources); *Interstate Natural Gas Ass'n of America v. FERC*, 285 F.3d 18, 57 (D.C. Cir. 2002) (once agency announces intention to revisit its own discretionary policy and receives comment on that

proposal, it is under a duty to make a final decision within a reasonable time); *Cobell v. Norton*, 240 F.3d 1081, 1096-99 (D.C. Cir. 2001) (Department of Interior has fiduciary duty, irrespective of any statutory obligation, to provide Indian trust fund beneficiaries an accounting of their funds within a reasonable time); *In re International Chemical Workers Union*, 958 F.2d 1144, 1149 (D.C. Cir. 1992) (*per curiam*) (court has jurisdiction to hear plaintiffs' complaint that Occupational Health and Safety Administration unreasonably delayed final decision on rulemaking petition for occupational exposure standard); *United Steelworkers of America v. Pendergrass*, 819 F.2d 1263, 1270 (3d Cir. 1987) (court has authority under unreasonable delay provisions of the APA to order agency to issue a workplace standard by a specific date); *Oil, Chemical and Atomic Workers Intern. Union v. Zegeer*, 768 F.2d 1480, 1484-85 (D.C. Cir. 1985) (court has jurisdiction to decide whether Mine Safety and Health Administration response to petition for standard was unreasonably delayed); *Public Citizen Health Research Group v. Commissioner, Food and Drug Administration*, 740 F.2d 21, 34 (D.C. Cir. 1984) (court has jurisdiction to decide whether agency has unreasonably delayed acting on citizen petition for warning label on aspirin products); *Public Citizen Health Research Group v. Auchter*, 702 F.2d 1150, 1158 (D.C. Cir. 1983) (court has jurisdiction under APA sections 555(b) and 706(1) to compel agency to complete rulemaking regarding occupational exposure standards within a reasonable time).

In its brief to this Court, the government acknowledges that there is no need for a separate mandatory duty with respect to several kinds of cases. Gov't Brf. at 20. Thus, it states that "Section 706(1) permits a court to order an agency to respond to a rulemaking petition within a reasonable time

. . . or to make a 'final determination' on an administrative complaint . . . or to act on a permit application." *Id.* (internal citations omitted). However, the government omits an extremely important category from this list: the situation where the agency on its own initiates a specific administrative proceeding – even a discretionary one – but fails to bring it to a conclusion "within a reasonable time." 5 U.S.C. § 555(b).

In such cases, pursuant to 5 U.S.C. §§ 555(b) and 706(1), a court may review a proper plaintiff's complaint that the agency has "unreasonably delayed" concluding that proceeding, and, should the court agree with the plaintiff's contention, pursuant to section 706(1), the court "shall" order the agency to reach a final decision. *See, e.g., Interstate Natural Gas Ass'n of America*, 285 F.3d at 57; *see also Grand Canyon Air Tour Coalition v. FAA*, 154 F.3d 455, 478 (D.C. Cir. 1998) (even though agency had discretion to determine best way to reduce aircraft noise over Grand Canyon, once agency issued Advance Notice of Proposed Rulemaking, court may entertain petition to compel the agency to complete the proceeding within a reasonable time); *Cutler v. Hayes*, 818 F.2d 879, 895 (D.C. Cir. 1987) ("[o]nce the FDA elected to respond to its legislative directive [that over the counter drugs be both safe and effective] by establishing the OTC [over-the-counter] drug review program, the APA imposed an obligation to proceed with reasonable dispatch," (*relying on* 5 U.S.C. §§ 555(b), 706(1))); *Telecommunications Research & Action v. F.C.C.*, 750 F.2d 70, 73, 76-77 (D.C. Cir. 1984) (where agency has issued its own "notice of inquiry" and solicited public comment on a particular matter, it must conclude that proceeding within a reasonable time).

As Judge D.H. Ginsburg succinctly explained in *Sierra Club v. Thomas*, 828 F.2d 783, 794 (D.C. Cir. 1987):

> Unlike claims alleging agency recalcitrance in the face of a 'clear statutory duty,' the petitioner alleging 'unreasonable delay' does not contend that agency inaction violates a clear duty to take a particular action by a date certain. Instead . . . the claim is that *while the agency may have discretion over whether to act at all*, it has exercised that discretion by deciding that it would determine what action, if any, to take, and that *it must now do so.*

(Emphasis added); *see also id.* ("[A]gencies most often fall under this duty of timeliness as a result of the *APA's broad prohibition against 'unreasonable delay*[,]'" (*citing* 5 U.S.C. §§ 555(b), 706(1)), [but] "[i]n other situations, the substantive statute itself may impose the obligation.") (emphasis added).[2]

Of course, in an "unreasonable delay" case, all the reviewing court may do is require the agency to make a final decision one way or another – *i.e.*, the court may not compel any particular substantive result. However, the court may certainly exercise jurisdiction over that case, whether or not the agency has some *additional* statutory obligation – apart from sections 555(b) and 706(1) of the APA – to undertake or complete that particular proceeding. Accordingly, *Amici* respectfully urge that, whatever ruling this Court issues in this case, there is no reason for it to disturb – or even to

2. As the foregoing cases demonstrate, the mere fact that § 555(b) states that the agency shall complete matters "presented to it" within a reasonable time does not foreclose a § 706(1) claim where the agency itself has initiated the proceeding.

address – this well established rule of administrative law, especially when this particular issue is not necessary to the resolution of this case.

II. The BLM's Obligation To Prepare A Supplemental EIS Stems From A Mandatory Duty Imposed By The Binding Council On Environmental Quality Regulations.

Amici also wish to stress that whether the Bureau of Land Management is obligated to prepare a Supplemental EIS in this case is dictated by NEPA, 42 U.S.C. § 4332(2)(C), and the CEQ regulations that implement that statute, 40 C.F.R. § 1500.1, *et seq.* As this Court has noted, *Andrus v. Sierra Club*, 442 U.S. 347, 351 (1979), and the government acknowledges, Gov't Brf. at 43, these regulations apply to all federal agencies. *See also Sierra Club v. Watkins*, 808 F. Supp. 852, 859 (D.D.C. 1991) (The CEQ regulations "define the terms of NEPA and detail the responsibilities of federal agencies.").

NEPA was enacted to "encourage productive and enjoyable harmony between man and his environment." 42 U.S.C. § 4321. Its basic purpose is to "help public officials make decisions that are based on [an] understanding of environmental consequences, and take decisions that protect, restore, and enhance the environment." 40 C.F.R. § 1500.1(c). To accomplish these objectives, NEPA mandates that "*to the fullest extent possible*" agencies "shall" prepare a "detailed statement" regarding all "major Federal actions significantly affecting the quality of the human environment. . . ." 42 U.S.C. § 4332(2)(C) (emphasis added). This Environmental Impact Statement ("EIS") must analyze the environmental impact of the proposed action, as well as alternative courses of action that would have fewer adverse impacts. *Id.*

The CEQ regulations further provide that an agency "shall" prepare a Supplemental EIS ("SEIS") when "*[t]here are significant new circumstances or information relevant to the environmental concerns and bearing on the proposed action or its impacts.*" 40 C.F.R. § 1502.9(c)(ii) (emphasis added). As with the initial EIS, the purpose of an SEIS is "to serve as an *action-forcing device to insure that the policies and goals defined in [NEPA] are infused into the ongoing programs and actions of the Federal Government.*" 40 C.F.R. § 1502.1 (emphasis added). Indeed, NEPA and its obligations apply to "major federal actions," including "new and *continuing activities*," as well as "new or revised agency rules, regulations, plans, policies, or procedures." 40 C.F.R. § 1508.18(a) (emphasis added).

Accordingly, the government wrongly states that NEPA imposes no "obligation on BLM to conduct an environmental analysis divorced from a *proposed* 'major Federal action.'" Gov't Brf. at 46 (emphasis added). On the contrary, because the plaintiffs have alleged that increased use of off-road vehicles is in fact causing significant environmental damage to the BLM lands at issue, and that BLM is also required by law to *monitor* the effects of ORV use on public lands, the plaintiffs have sufficiently alleged a viable claim pursuant to NEPA's implementing regulations and 5 U.S.C. § 706(1), that the courts may compel the production of an SEIS due to the presence of significant new information and circumstances. *See also Warth v. Seldin*, 422 U.S. 490, 501 (1975) (in deciding a motion to dismiss the court "must accept as true all material allegations of the complaint"); *Jenkins v. McKeithen*, 395 U.S. 411, 421-22 (1969) (the complaint must be "liberally construed in favor of the plaintiff[s]").

Whether an SEIS is ultimately required here goes to the *merits* of the plaintiffs' claim, not to whether the district court has jurisdiction even to hear that claim. *See, e.g., Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 375 (1989) (whether SEIS was required is controlled by the "arbitrary and capricious" standard of 5 U.S.C. § 706(2)). However, as this Court explained in *Marsh*, an agency must prepare a Supplemental EIS "if the new information is sufficient to show that the remaining action will . . . 'affect the environment' in a significant manner *or to a significant extent not already considered*." 490 U.S. at 374 (1989) (emphasis added) (internal citations omitted). In addition, the CEQ regulations provide that, where either an EIS or SEIS is required, the agency "*shall prepare a concise public record of decision*" which "shall: (a) [s]tate what the decision was[], (b) [i]dentify all alternatives considered by the agency in reaching its decision, specifying the alternative or alternatives which were considered to be environmentally preferable," and (c) "[s]tate whether all practicable means to avoid or minimize environmental harm from the alternative selected have been adopted and, if not, why they were not." 40 C.F.R. § 1505.2 (emphasis added).[3]

In short, under the CEQ regulations, where an SEIS is required, it *must* be accompanied by a record of decision – known as an "ROD" in NEPA parlance – stating whether,

3. The Court's statement in *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 737 (1998), in the context of discussing the ripeness of a NEPA claim, that "a person with standing who is injured by a failure to comply with NEPA procedure may complain of that failure at the time the failure takes place, for the claim can never get riper," further reinforces the justiciability of a plaintiff's claim that an agency has completely failed to prepare an SEIS, as required by the CEQ regulations.

and the extent to which, the agency has decided to modify its action in light of the "new information" bearing on the adverse environmental impacts of that action. 40 C.F.R. § 1505.9; *see, e.g., US Ecology, Inc. v. United States Department of the Interior*, 231 F.3d 20, 22 (D.C. Cir. 2000) ("NEPA regulations *require the agency to prepare a Record of Decision justifying its ultimate decision*" following preparation of an EIS) (emphasis added); *Corridor H Alternatives, Inc. v. Slater*, 166 F.3d 368, 371 (D.C. Cir. 1999) ("In a case requiring an EIS, *the agency must prepare a 'concise public record of decision'* that identifies all the alternatives it has considered and describes all factors it has taken into account in reaching its decision," (*quoting* 40 C.F.R. § 1505.2)) (emphasis added); *Valley Community Preservation Commission v. Mineta*, 231 F. Supp. 2d 23, 39 (D.D.C. 2002) ("In situations where an EIS is required, the agency is required to prepare 'a concise public record of decision' that describes the factors it considered in making its decision, and must identify 'all alternatives considered by the agency in reaching its decision, specifying the alternative or alternatives which were considered,'" (*quoting* 40 C.F.R. § 1505.2)); *California Department of Health Services v. Babbitt*, 46 F. Supp. 2d 13, 21 (D.D.C. 1999) ("NEPA regulations provide that the agency announce its decision among the alternatives analyzed in the EIS in the ROD," (*citing* 40 C.F.R. § 1505.2)), *vacated in part on other grounds*, 231 F.3d 20 (D.C. Cir. 2000); *see also* 40 C.F.R. § 1502.1 (NEPA serves as "an action-forcing device").

Accordingly, the government's assertion that the district court had no jurisdiction over the plaintiffs' NEPA claim because an SEIS itself is not an "agency action" that can be compelled by the court pursuant to 5 U.S.C. § 706(1), Gov't Br. at 44, is also wrong. If plaintiffs are correct that an SEIS

must be prepared under the CEQ regulations because there is significant new evidence of environmental impacts never previously considered by the agency, then the regulations also unequivocally require that an ROD must be prepared by the agency, as in all "cases requiring environmental impact statements." 40 C.F.R. § 1505.2. In turn, it is well-established that an ROD *is* a final agency action that is judicially reviewable under the APA. *See, e.g., Sierra Club v. Slater*, 120 F.3d 623, 631 (6th Cir. 1997) (it is "well-established that a final EIS or the ROD issued thereon constitute the 'final agency action' for purposes of the APA"); *Jersey Heights Neighborhood Ass'n v. Glendening*, 174 F.3d 180, 187 (4th Cir. 1999) (the "designation of the ROD as final agency action under the APA is generally recognized"); *see also Corridor H Alt.*, 166 F.3d at 374 (reviewing a ROD); *Friends of Yosemite Valley v. Norton*, 194 F. Supp. 2d 1066, 1080 (E.D. Cal. 2002), *rev'd in part on other grounds*, 348 F.3d 789 (9th Cir. 2003) ("The court thus concludes that Defendants' decision as set forth in the . . . ROD . . . is now ripe for review"). Hence, even under the government's own analysis as to when claims may be brought under section 706(1) of the APA – *i.e.*, where the court is being asked for relief that will result in final agency action reviewable under section 706(2) of the APA – a claim that the CEQ standards for preparing an SEIS and accompanying ROD are satisfied is clearly cognizable.

Finally, it is important to recognize that, if such claims were *not* cognizable in any fashion, except when the government itself *opts* to embark on a new decisionmaking process – as the government would have this Court rule – this would completely undermine the basic purpose of NEPA. As this Court explained in *Marsh*, "[i]t would be incongruous" with NEPA "for the blinders to adverse

environmental effects, once unequivocally removed, to be restored prior to the completion of the agency action *simply because the relevant proposal has received initial approval*." 490 U.S. at 371 (emphasis added). Yet, under the government's proposed approach, an agency would be completely free, following initial project approval, to "restore" the "blinders" even to devastating new environmental impacts, as long as the agency insists that it has made no *new* decision based on those impacts. Indeed, the government's approach has the truly perverse effect of *rewarding* an agency for remaining as blind as possible to new evidence of environmental problems, since, if it does so, it can avoid any judicial review of its NEPA compliance. However, it is impossible to reconcile that result with NEPA's purposes, as construed by this Court in *Marsh*, and, contrary to the government's insistence, it certainly is *not* a result that is dictated by the APA.

CONCLUSION

Amici respectfully submit that the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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In The

Supreme Court of the United States

GALE NORTON, SECRETARY
OF THE INTERIOR, *ET AL.*,

Petitioners,

v.

SOUTHERN UTAH
WILDERNESS ALLIANCE, *ET AL.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF THE NATIONAL ORGANIZATION OF VETERANS' ADVOCATES AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

	Page
Table of Authorities	ii
Interest of the *Amicus Curiae*	1
Summary of the Argument	2
Argument	3
THE VETERANS-BENEFITS ADJUDICATION PROCESS ILLUSTRATES WHY SECTION 706(1) SHOULD BE INTERPRETED TO PERMIT COURTS TO COMPEL AGENCIES TO PERFORM ANY CONGRESSIONALLY MANDATED ACTION..	3
A. The VA Claims Adjudication Process	3
B. Congress Expressly Modeled 38 U.S.C. § 7261(a)(2) On Section 706(1)	4
C. The Federal Circuit Held That Section 7261(a)(2) Is Inoperative Absent A Timely Appealed Final BVA Decision	6
D. The VA's Adjudication Backlog Demonstrates Why Relief Under Section 706(1) Should Be Available Even When The Action Sought Would Not Be The Agency's Final Decision	7
Conclusion	9
Appendix	1a

TABLE OF AUTHORITIES

Page

CASES:

Disabled Am. Veterans v. Gober, 234 F.3d 682 (Fed. Cir. 2000) 1

Forest Guardians v. Babbitt, 174 F.3d 1178 (10th Cir. 1998) 6, 7

Kerr v. United States Dist. Court, 426 U.S. 394 (1976) 9

Southern Utah Wilderness Alliance v. Norton, 301 F.3d 1217 (10th Cir. 2002), *cert. granted*, 124 S. Ct. 462 (2003) 9

Wick v. Brown, 40 F.3d 367 (Fed. Cir. 1994) 6, 7

STATUTES:

5 U.S.C. § 706 (2000) 2

5 U.S.C. § 706(1) (2000) ..... *passim*

5 U.S.C. § 706(2) (2000) 7

28 U.S.C. § 1254(1) (2000) 4

38 U.S.C. § 5103(a) (2000) 3

38 U.S.C. § 5103A (2000) 3

38 U.S.C. § 7104(a) (2000) 3, 7

38 U.S.C. § 7105(a) (2000) 3, 4

38 U.S.C. § 7105(b)(1) (2000) 3

38 U.S.C. § 7105(d)(1) (2000) 3, 4

38 U.S.C. § 7252(a) (2000) 4, 6, 7

38 U.S.C.A. § 7261 (West 2002 & Supp. 2003) 4, 5

38 U.S.C.A. § 7261(a) (West 2002 & Supp. 2003) 6

TABLE OF AUTHORITIES – Continued

Page

38 U.S.C. § 7261(a)(2) (2000) ..... *passim*

38 U.S.C. § 7266(a) (2000) 4, 7

38 U.S.C.A. § 7292 (West 2002 & Supp. 2003) 4

REGULATIONS:

38 C.F.R. § 3.159 (2003) 3

38 C.F.R. § 19.26 (2003) 3

38 C.F.R. § 19.29 (2003) 4

38 C.F.R. § 19.31(b)(1) (2003) 4

38 C.F.R. § 19.37(a) (2003) 4

38 C.F.R. § 19.38 (2003) 8

38 C.F.R. § 20.3(a) (2003) 3

38 C.F.R. § 20.101(a) (2003) 3

38 C.F.R. § 20.200 (2003) 3, 4

38 C.F.R. § 20.201 (2003) 3

38 C.F.R. § 20.800 (2003) 4

OTHER AUTHORITIES:

Hearing on Department of Veterans Affairs Budget Request for FY 2005 Before the House Comm. on Veterans Affairs, 108th Cong. ___, *available at* http://www.house.gov/va/hearings/schedule108/feb04/2-4-04/aprincipi.pdf (Feb. 4, 2004) 8

TABLE OF AUTHORITIES – Continued

Page

Carol R. Miaskoff, Note, *Judicial Review of Agency Delay and Inaction Under Section 706(1) of the Administrative Procedure Act*, 55 Geo. Wash. L. Rev. 635 (1987) 8

S. Rep. No. 100-418 at 60 (1988) 5

U.S. General Accounting Office, Testimony Before the Subcomm. on Oversight and Investigations, Comm. on Veterans' Affairs, House of Representatives (GAO/T-HEHS/AIMD-00-146, May 18, 2000) 8

Veterans Benefits Amendments of 1989, Pub. L. No. 101-237, 103 Stat. 2095 (1989) 5

Veterans Judicial Review Act, Pub. L. No. 100-687, 102 Stat. 4113 (1988) 5

Catherine Zaller, *The Case for Strict Statutory Construction of Mandatory Agency Deadlines Under Section 706(1)*, 42 Wm. and Mary L. Rev. 1545 (2001) 7

68 Fed. Reg. 69,065 (Dec. 11, 2003) 8

135 Cong. Rec. 23,085 (1989) 5

135 Cong. Rec. 30,617 (1989) 5

INTEREST OF THE *AMICUS CURIAE*[1]

Amicus Curiae National Organization of Veterans' Advocates, Inc., ("NOVA") is an organization of attorneys and non-attorney practitioners who devote some or all of their practice to representing those "seeking benefits through the federal veteran's [sic] benefits system, and in particular those seeking judicial review of denials of veterans' benefits." *Disabled Am. Veterans v. Gober*, 234 F.3d 682, 689 (Fed. Cir. 2000), *cert. denied sub nom. National Org. of Veterans' Advocates, Inc. v. Principi*, 532 U.S. 973 (2001). NOVA conducts biannual educational seminars on veterans law, and has filed multiple briefs as *amicus curiae* before the United States Court of Appeals for the Federal Circuit and the United States Court of Appeals for Veterans Claims ("CAVC").

NOVA's interest in this case evolves from its members' unsuccessful efforts to obtain relief for their clients from the CAVC under 38 U.S.C. § 7261(a)(2) (2000), which Congress expressly modeled on 5 U.S.C. § 706(1) (2000). NOVA respectfully asserts that the Federal Circuit's restrictive construction of section 7261(a)(2), and that construction's effect on veterans, demonstrates why the United States Court of Appeals for the Tenth Circuit correctly interpreted section 706(1).

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[1] This brief is filed with the parties' consent; the letters indicating this consent accompany this brief. No part of this brief was authored by counsel for a party, and no person or entity other than the *amicus curiae* made a monetary contribution to the preparation or submission of the brief.

SUMMARY OF THE ARGUMENT

Judicial review of decisions by the United States Department of Veterans Affairs ("VA") is conducted under scope-of-review standards Congress expressly borrowed from 5 U.S.C. § 706 (2000). As noted above, 38 U.S.C. § 7261(a)(2) was specifically modeled on section 706(1). The Federal Circuit has ruled that the CAVC can exercise its authority under section 7261(a)(2) only after it has received a timely appeal from the final VA decision denying benefits, an analysis similar to that which Petitioners offer in the case at bar.

NOVA respectfully submits that veterans' inability to invoke section 7261(a)(2) to seek relief from unlawfully-withheld or, particularly, unreasonably-delayed VA action prior to a final decision denying their claims illustrates the accuracy of the Tenth Circuit's construction of section 706(1) as permitting relief prior to a final agency action. Moreover, the intricacies of the VA claims-adjudication process demonstrate why reviewing courts should be permitted to compel unlawfully-withheld or unreasonably-delayed agency action even if that action would not be the final determination of the matter. Section 706(1)'s text and legislative history indicate that Congress intended to provide a remedy for agency recalcitrance in fulfilling a mandatory duty regardless of the stage in the administrative process at which it occurs.

Accordingly, NOVA supports the Respondents in this case, and urges the Court to affirm the Tenth Circuit's judgment.

ARGUMENT

THE VETERANS-BENEFITS ADJUDICATION PROCESS ILLUSTRATES WHY SECTION 706(1) SHOULD BE INTERPRETED TO PERMIT COURTS TO COMPEL AGENCIES TO PERFORM ANY CONGRESSIONALLY MANDATED ACTION.

A. The VA Claims Adjudication Process.

A claim for VA benefits is initially adjudicated by an "agency of original jurisdiction" ("AOJ"), usually a VA regional office. *See* 38 U.S.C. § 7105(b)(1) (2000); 38 C.F.R. § 20.3(a) (2003). The AOJ bears a statutory duty to assist the claimant in substantiating the claim; the duty includes obtaining pertinent military and medical records, and, when necessary, providing a VA medical examination. 38 U.S.C. § 5103A (2000); 38 C.F.R. § 3.159 (2003). The AOJ also must provide the claimant notice of the information and evidence necessary to substantiate the claim, and whether the claimant or the agency is responsible for obtaining such information or evidence. 38 U.S.C. § 5103(a) (2000).

An adverse AOJ decision may be appealed to the Board of Veterans' Appeals ("BVA"). 38 U.S.C. § 7104(a) (2000); 38 C.F.R. § 20.101(a) (2003). The claimant initiates the appeal by filing a timely notice of disagreement ("NOD"), which is a written communication expressing dissatisfaction or disagreement with the decision. 38 U.S.C. § 7105(a) (2000); 38 C.F.R. §§ 20.200, 20.201 (2003). Once the claimant files a NOD, the AOJ must prepare a statement of the case ("SOC") to assist the claimant in presenting argument to the BVA. 38 U.S.C. § 7105(d)(1) (2000); 38 C.F.R. § 19.26 (2003). The SOC must include a summary of the pertinent evidence, the pertinent laws and regulations, and a summary of the reasons for the

decision. 38 U.S.C. § 7105(d)(1); 38 C.F.R. § 19.29 (2003). The appeal is perfected by the timely filing of a "substantive appeal" following receipt of the SOC. 38 U.S.C. § 7105(a); 38 C.F.R. § 20.200. The claimant may submit additional evidence to the AOJ after perfecting the appeal. *See* 38 C.F.R. § 20.800 (2003). If the additional evidence does not lead to an award of benefits, the AOJ must prepare a supplemental statement of the case ("SSOC"), which communicates any material changes in, or additions to, the information included in the SOC. 38 C.F.R. §§ 19.31(b)(1), 19.37(a) (2003).

The claimant may appeal a BVA decision to the CAVC, which has exclusive jurisdiction over such appeals. 38 U.S.C. §§ 7252(a), 7266(a) (2000). The scope of the CAVC's review is prescribed by 38 U.S.C.A. § 7261 (West 2002 & Supp. 2003). Either party may appeal a CAVC decision to the Federal Circuit, which has jurisdiction to review pure questions of law decided by the CAVC. 38 U.S.C.A. § 7292 (West 2002 & Supp. 2003). The losing party before the Federal Circuit may petition this Court for a writ of *certiorari*. 28 U.S.C. § 1254(1) (2000).

B. Congress Expressly Modeled 38 U.S.C. § 7261(a)(2) On Section 706(1).

Section 7261(a)(2) requires the CAVC, "to the extent necessary to its decision and when presented," to "compel action of the Secretary unlawfully withheld or unreasonably delayed[.]" 38 U.S.C. § 7261(a)(2). Section 706(1) is essentially identical, instructing reviewing courts, "[t]o the extent necessary to decision and when presented," to ". . . compel agency action unlawfully withheld or unreasonably

delayed[.]" 5 U.S.C. § 706(1). The similarity is not coincidental. The legislative history of the Veterans Judicial Review Act, Pub. L. No. 100-687, 102 Stat. 4113 (1988) ("VJRA"), and the Veterans Benefits Amendments of 1989, Pub. L. No. 101-237, 103 Stat. 2095 (1989) ("VBA"), documents that section 7261(a)(2) was specifically modeled on section 706(1).

Section 7261 emerged from the initial version of the VJRA that passed the Senate in 1988. The accompanying Senate Committee on Veterans Affairs' report states that

> proposed section[s] [7261](a)(1) through (a)(3) are derived specifically from section 706 of the APA. Thus, it is the Committee's intention that the court shall have the same authority as it would in cases arising under the APA. . . .

S. Rep. No. 100-418 at 60 (1988). Section 7261(a)(2) as enacted in the VJRA only empowered the CAVC to act against agency action "unlawfully withheld." *See* VJRA § 301(a). In 1989, the CAVC's chief judge asked the Committee to amend the statute to give the court the ability to compel action "unreasonably delayed." *See* 135 Cong. Rec. 23,085 (1989). Senator Cranston, the Committee chairman, stated that this amendment "would parallel the comparable judicial-review provision in the [APA], section 706(1)[,]" and "concur[red] that these changes are appropriate to clarify the court's powers." *Id.* The language was added as part of the VBA in 1989. *See* 135 Cong. Rec. 30,617 (1989).

This history, and section 7261(a)(2) being one of only two statutes other than section 706(1) containing the terms "unlawfully withheld" and "unreasonably delayed[,]"

Forest Guardians v. Babbitt, 174 F.3d 1178, 1189 n.15 (10th Cir. 1998), establishes that Congress intended section 7261(a)(2) to be the functional equivalent of section 706(1).

C. The Federal Circuit Held That Section 7261(a)(2) Is Inoperative Absent A Timely Appealed Final BVA Decision.

In *Wick v. Brown*, 40 F.3d 367 (Fed. Cir. 1994), the Secretary of Veterans Affairs appealed a CAVC decision ordering him to pay Mr. Wick attorneys fees his agents erroneously released to Mr. Wick's client. *Wick*, 40 F.3d at 369-70. The Federal Circuit held that the CAVC erred because it, in fact, did not have jurisdiction to decide the matter. *Id.* at 373. Addressing the CAVC's reliance on section 7261(a)(2), the court held that the CAVC

> may compel action of the Secretary only if the Secretary's action is 'necessary to [the court's] decision' in a matter over which it has subject matter jurisdiction, *viz.*, an appeal from a 'decision of the Board.' The court here had no decision to make concerning which its compulsion of the Secretary was necessary.

Id. at 371-72 (quoting sections 7252(a) and 7261(a)). In other words, the Federal Circuit held that a claimant may seek relief under section 7261(a)(2) only if he or she has timely appealed a final BVA decision. *See id.* Consequently, veterans cannot invoke section 7261(a)(2) to remedy, for example, the AOJ's unlawfully-withheld compliance with the statutory duty to assist or unreasonably-delayed preparation of a SOC or SSOC. *See id.*

D. The VA's Adjudication Backlog Demonstrates Why Relief Under Section 706(1) Should Be Available Even When The Action Sought Would Not Be The Agency's Final Decision.

Subject, of course, to the breadth of the Court's analysis, it is likely that *Wick*'s finality requirement would be overruled if the Court affirms the Tenth Circuit. The Petitioners present an argument which, if adopted, would sustain *Wick*. They argue that courts can exercise authority under section 706(1) only where the putatively withheld or delayed agency action would constitute

> final agency action, *i.e.*, an action that culminates the agency's decisionmaking process and 'by which rights or obligations have been determined, or from which legal consequences will flow,' . . . the sort of action that, if taken by the agency rather than withheld or delayed, would be reviewable under Section 706(2).

Brief for the Petitioners at 17 (citation omitted). This argument's application to the VA claims-adjudication scheme would dictate that the only action the CAVC could compel would be an unlawfully-withheld or unreasonably-delayed BVA decision. *See id.*; 5 U.S.C. §§ 706(1), (2); 38 U.S.C. §§ 7104(a), 7252(a), 7261(a)(2), 7266(a). While this analysis would benefit veterans more than *Wick*'s holding, it appears to be inconsistent with section 706(1)'s (and, thus, section 7261(a)(2)'s) purpose.

Congress enacted section 706(1) because it "expressly recognize[d] the right of properly interested parties to compel agencies to act where they improvidently refuse to act." *Forest Guardians*, 174 F.3d at 1189 (quoting S. Rep. No. 79-752 (1945)). *See also* Catherine Zaller, *The Case for*

Strict Statutory Construction of Mandatory Agency Deadlines Under Section 706(1), 42 Wm. and Mary L. Rev. 1545, 1547-52 (2001) (discussing APA's legislative history); Carol R. Miaskoff, Note, *Judicial Review of Agency Delay and Inaction Under Section 706(1) of the Administrative Procedure Act*, 55 Geo. Wash. L. Rev. 635 (1987) (discussing relationship between mandamus practice and section 706(1)).

The adjudication of veterans' claims typically presents many opportunities for such improvident refusals to act long before the BVA receives the claim to make the final agency decision. The May 2000 General Accounting Office ("GAO") report on "Problems and Challenges Facing Disability Claims Processing" includes a flow chart mapping the extraordinary number of opportunities for unreasonable delay in the initial adjudication of a new claim alone. App. 20a-28a. This byzantine process leads to delay in all claims because the AOJ also must process appealed claims remanded for further development and readjudication. *See* 38 C.F.R. § 19.38 (2003); 68 Fed. Reg. 69,065 (proposed Dec. 11, 2003) (to be codified at 38 C.F.R. § 19.9(a)). For example, despite significant improvements in claims processing under Secretary Principi, approximately 250,000 claims currently are pending at some stage of the adjudicative process, with the initial decision of a new claim taking approximately five months. *See Hearing on Department of Veterans Affairs Budget Request for FY 2005 Before the House Comm. on Veterans Affairs*, 108th Cong. ___ (statement of Anthony J. Principi, Secretary of Veterans Affairs), *available at* http://www.house.gov/va/hearings/schedule108/feb04/2-4-04/aprincipi.pdf (Feb. 4, 2004). If section 706(1) (and, thus, section 7261(a)(2)), is available only to compel a final agency decision, the only

relief available for veterans whose initial claims are being unreasonably delayed is mandamus, which, as the Tenth Circuit observed, a court can deny as a matter of discretion even if it agrees that the delay is unreasonable. *See Kerr v. United States Dist. Court*, 426 U.S. 394, 403 (1976); *Southern Utah Wilderness Alliance v. Norton*, 301 F.3d 1217, 1226 n.6 (10th Cir. 2002), *cert. granted*, 124 S. Ct. 462 (2003).

CONCLUSION

The Tenth Circuit's judgment should be affirmed.

Respectfully submitted,

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Testimony

Before the Subcommittee on Oversight and Investigations, Committee on Veterans' Affairs, House of Representatives

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VETERANS BENEFITS ADMINISTRATION

Problems and Challenges Facing Disability Claims Processing

Statement of Cynthia A. Bascetta, Associate Director Veterans' Affairs and Military Health Care Issues Health, Education, and Human Services Division

[SEAL]

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GAO/T-HEHS/AIMD-00-146

Veterans Benefits Administration: Problems and Challenges Facing Disability Claims Processing

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Mr. Chairman and Members of the Subcommittee:

We are pleased to be here today to provide an overview of claims processing in the disability compensation program

through which the Department of Veterans Affairs (VA) provides cash benefits to more than 2.5 million veterans, their dependents, and survivors. The compensation program pays monthly benefits – based on degree of disability – to veterans who have service-connected disabilities (injuries or diseases incurred or aggravated while on active military duty). Administered by the Veterans Benefits Administration (VBA), the compensation program is VBA's largest program, accounting for about 72 percent of fiscal year 1999 cash outlays (about $18 billion out of $25 billion). For years, the compensation program has been the subject of concern and attention within VA and by the Congress and veterans' service organizations. The concerns have focused on backlogs of claims, long waits for disability decisions, and the poor quality of these decisions, all of which have negatively affected the quality of service provided to veterans.

We have issued a number of reports on VBA's claims-processing operations, and the Congress has sponsored studies of the disability compensation program, including studies by the Veterans' Claims Adjudication Commission and the National Academy of Public Administration (NAPA). Today, drawing on this body of work, I will focus on four key areas related to compensation claims processing: (1) longstanding performance problems, (2) claims-processing complexities, (3) challenges to improving performance, and (4) VBA's initiatives to improve performance.

In summary, VBA's problems with large backlogs and long waits for decisions have not yet improved, despite years of studying these problems. Moreover, VBA's new quality measurement system shows that nearly one-third of decisions are incorrect or have technical or procedural errors. Many performance problems stem from the process's

complexity, which is growing as the number of service-connected disabilities per veteran increases and judicial review requires more procedures and documentation. Although VBA has initiated a number of efforts to streamline its claims-processing performance, it is unclear how much improvement will be gained. Also, VBA may need to collect and analyze additional case-specific data to better understand its claims-processing problems and better target its corrective actions. Furthermore, because some issues affecting VBA's performance are a function of program design, more fundamental changes may have to be considered to realize significant improvements.

Background

Veterans may submit claims to any one of VBA's 57 regional offices. To develop a veteran's claim, the regional office obtains the veteran's existing medical and military service records and, if necessary, arranges for the veteran to be examined by physicians in the Veterans Health Administration (VHA).[1] The regional office evaluates the veteran's service-connected impairments and assigns a rating for the degree to which the veteran is disabled, ranging from zero to 100 percent (expressed in 10-percent increments). For veterans with multiple disabilities, the regional office combines the ratings for each disability into a single, composite rating. If a veteran disagrees with the regional office's decision, he or she can ask for a regional

[1] Before fully developing a claim, the regional office determines whether the claim is well grounded, that is, that there is evidence supporting a plausible case that the veteran has a current disability related to a service-connected condition.

office hearing or submit a "notice of disagreement" and file an appeal asking VA's Board of Veterans' Appeals to review the decision. The Board makes the final decision on such appeals and can grant benefits, deny benefits, or remand (return) the case to the regional office for further development and reconsideration. After reconsidering a remanded decision, the regional office either grants the claim or returns it to the Board for a final VA decision. If the veteran disagrees with the Board's decision, he or she may appeal to the U.S. Court of Appeals for Veterans Claims. If either the veteran or VA disagrees with this court's decision, they may appeal to the Court of Appeals for the Federal Circuit.

Long-Standing Performance Problems in Compensation Claims Processing

For a number of years, VBA's regional offices have experienced problems processing compensation claims. These have included large backlogs of pending claims, lengthy processing times for initial claims, high error rates in claims processing, and questions about the consistency of regional office decisions.

As acknowledged by VBA, backlogs of claims have resulted in veterans having to endure long waits to receive decisions on their initial claims and on their appeals. As shown in figure 1, at the end of fiscal year 1999, VBA had about 69,000 pending initial compensation claims, of which over 23,000 (34 percent) had been pending for more than 6 months. You can see that in all categories the number of claims pending has been growing since 1996.

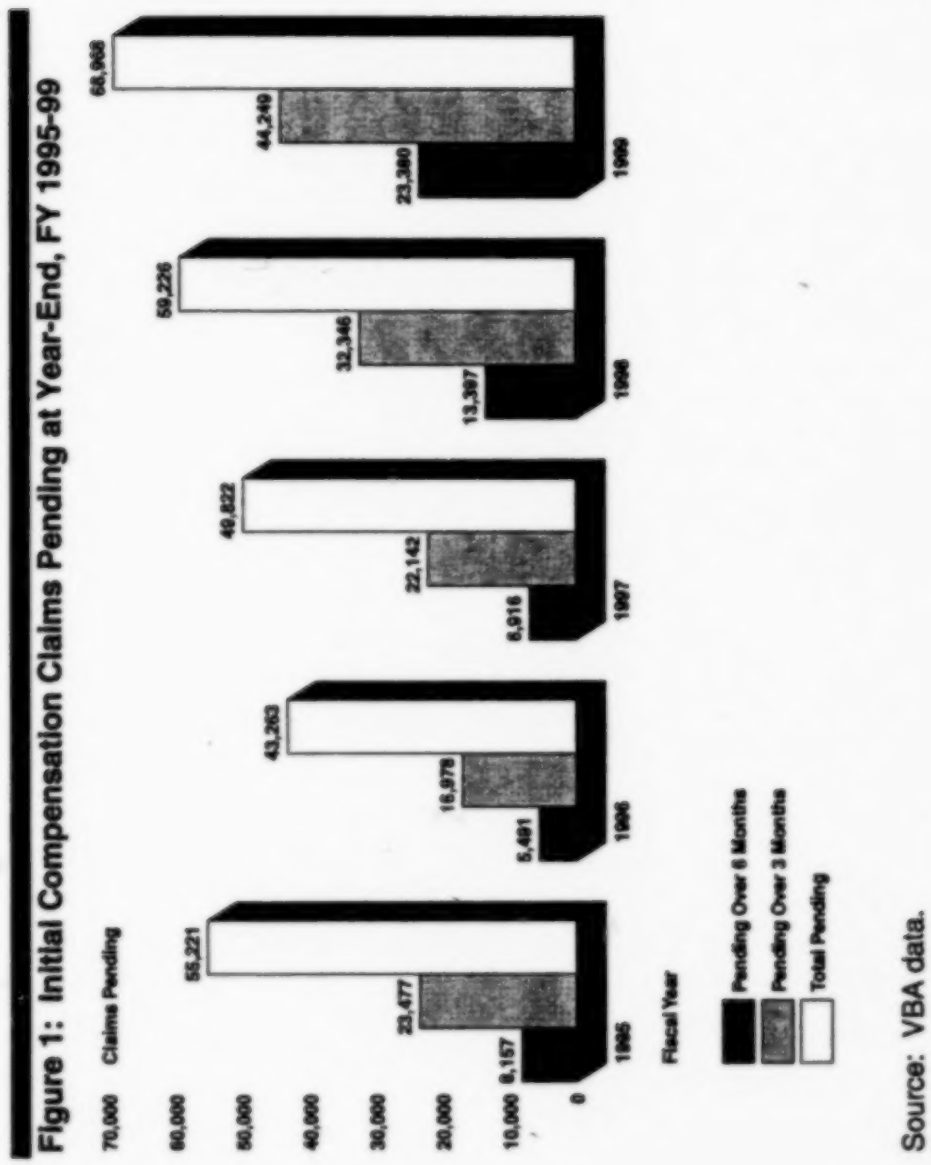


Figure 1: Initial Compensation Claims Pending at Year-End, FY 1995-99

Source: VBA data.

The average time for processing initial compensation claims peaked at 213 days in fiscal year 1994, as shown in figure 2. Thereafter, timeliness seems to improve through fiscal year 1997, as average processing time declined to 133 days. However, according to VA, apparent improvements were based on timeliness data that substantially understated the actual time required to process claims. This was revealed by a VA Inspector General audit, which found that timeliness data reported by regional offices had been in error by as much as 34 percent. After VBA took action to correct the data reporting problems, the average processing time again climbed, reaching 205 days in fiscal year 1999. This places VBA far from reaching its strategic goal of 74 days average processing time for claims that require disability ratings.[2]

[2] In its fiscal year 2001 performance plan, VBA did not establish separate processing-time goals for compensation and pension claims. Instead, the 74-day goal is a composite goal for all compensation and pension actions requiring disability ratings. Initial compensation claims, on average, require more time to process than initial pension claims.

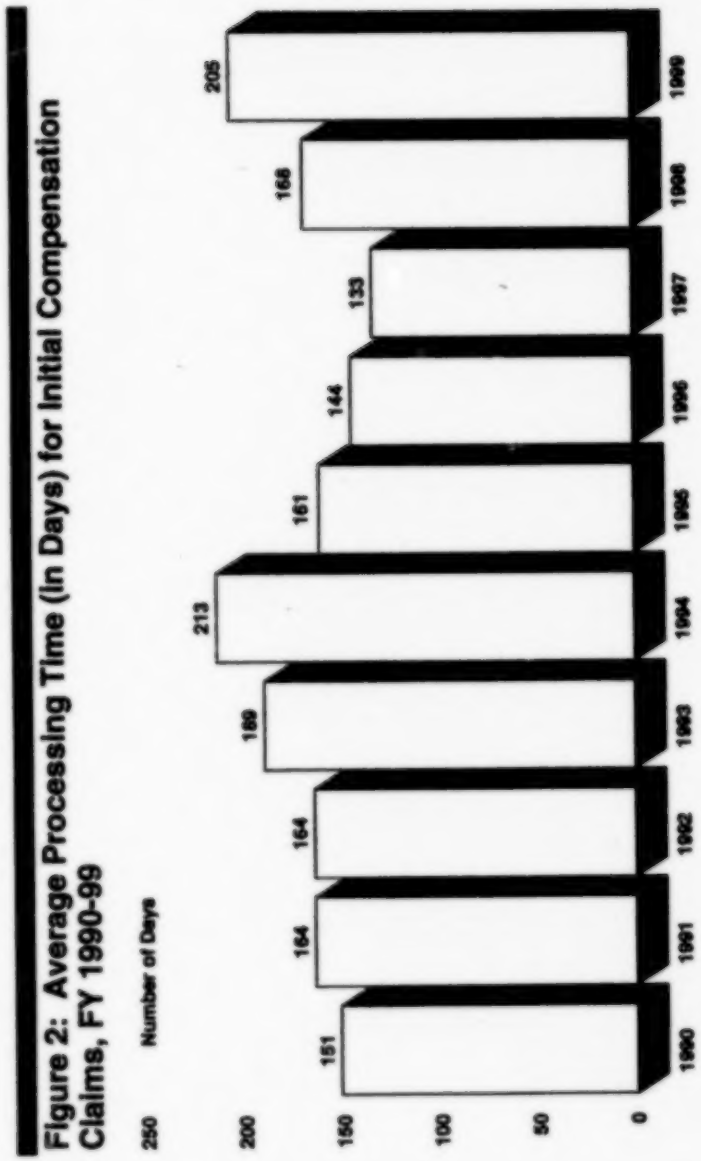


Figure 2: Average Processing Time (In Days) for Initial Compensation Claims, FY 1990-99

Source: VBA data.

When veterans appeal decisions made by regional offices, the average time spent to resolve the appeals is even longer than the time that the regional offices spent making the initial decisions.[3] For appeals resolved during fiscal year 1999, the average time required was over 2 years (745 days) from the date the veteran submitted a notice of disagreement with the regional office's decision.

In addition to problems with timeliness of decisions, VBA acknowledges that the accuracy of regional office decisions needs to be improved. VBA historically had reported that regional offices processed claims accurately over 95 percent of the time; however, concerns about accuracy arose in the 1990s when dramatic increases occurred in the percentage of appealed cases remanded to regional offices by the Board of Veterans' Appeals.[4] As a result, VBA implemented a new accuracy measurement system in fiscal year 1999 under which the error rate includes not only incorrect decisions on whether to grant or deny claims but also procedural and technical errors such as failure to include all required documentation in the case file or to properly notify veterans of decisions. Using the new method, VBA calculated an accuracy rate of 68 percent (32-percent error rate) for initial decisions requiring disability ratings. For fiscal year 2000, VBA has set an

[3] A relatively small proportion of initial decisions are appealed to the Board of Veterans' Appeals. In fiscal year 1997, for example, veterans filed appeals in 5.4 percent of all regional office initial decisions.

[4] Not every remand indicates that the regional office made an error. For instance, remands can result from submission of new evidence or changes in regulations that occur after an appealed case is sent to the Board.

accuracy goal of 81 percent; its long-term strategic goal is 96 percent accuracy.

Another problem is the perception of inconsistency in decisions made by different regional offices. In 1997, NAPA identified several factors that could lead to inconsistency in VBA's decisions: (1) achieving consistency across 57 decentralized offices is inherently difficult, (2) regional office staff must deal with a variety of medical issues that often require them to make subjective judgments, (3) VBA's regulations were unclear and subject to varying interpretations, and (4) VBA lacked a comprehensive training strategy that identified training needs and used standardized training to meet these needs. NAPA stated that VBA needed to identify the degree of subjectivity expected for various medical issues, set consistency standards, and measure the level of consistency as part of the quality review process or through testing of control cases in several regional offices.

Claims Processing Is Complex

Regional offices perform six basic functions in processing initial claims for service-connected disability compensation. Although VBA has made some changes in the process and plans to make additional changes, regional offices will still need to perform the six basic functions:

- receive the claim – the veteran submits the claim form to the regional office in person, through a veterans' service organization, or through the mail;
- establish the claim – the regional office enters basic information about the veteran and

the claim into a computer system and sets up a claim file folder;

- develop the claim – the regional office reviews the claim file folder for military service and medical information, requests and obtains missing information, and reviews all pertinent information to determine basic eligibility;
- rate the claim – the regional office analyzes the veteran's service records and service and private medical records and determines the veteran's level of disability;
- determine the payment amount – the regional office reviews the claim file folder to ensure that the rating is consistent with statutes and VBA policies and to determine the payment amount; and
- authorize the claim – the regional office reviews previous work on the claim, approves the initiation of benefit payments, and provides notification of the decision to the veteran, along with information on how to appeal should the veteran disagree with the decision.

As we reported in 1994, many in VA blamed part of the claims-processing delays on the traditional, assembly line processing approach used in regional offices.[5] Under the traditional approach, each claim passed sequentially through several individuals who separately performed the

[5] *Veterans' Benefits: Status of Claims Processing Initiative in VA's New York Regional Office* (GAO/HEHS-94-183BR, June 17, 1994).

six processing functions mentioned. VBA has started moving toward a team-based, case management approach under which a regional customer service team is collectively responsible for processing each claim from beginning to end, thereby avoiding multiple handoffs of the claim to individuals who separately perform each task. The regional offices are in various stages of implementing this new approach. In addition, the regional offices have implemented two systems to assist them with their work. One tracks the location of claims folders, while the other system prevents the entry of duplicate requests for service verification and service medical records. Also, for claimants discharged from military service after May 1, 1994, the Department of Defense now automatically transfers their service medical records to VA, alleviating the need to request these records.

The changes made to date, however, have done little to streamline the overall process. Currently, the process contains as many as 66 decision points and 39 queues (or waiting points) (see the app. for a depiction of the initial compensation claims process). Of the 39 queues, 28 are points at which claims wait for attention from regional office staff, and 11 are points at which regional office staff wait for information from external sources not under their control. For example, NAPA reported in 1997 that it was not unusual for regional offices to take as long as 80 days to request and obtain information such as (1) military service dates; (2) service medical records; (3) verification of receipt and amounts of military severance pay, separation pay, and/or retired pay; (4) medical records from private physicians, hospitals, and VA medical centers; and (5) other evidence in the custody of military authorities or other government agencies. Even after obtaining this

information, regional staff often find they need additional medical evidence to determine a veteran's precise current medical status. In such cases, the staff must schedule the veteran for an examination by a VHA or contract physician. If regional staff find that the physician's initial examination is not adequate, they must request a follow-up examination.

Another factor that can increase complexity and contribute to claims-processing delays is that veterans have the right, by law, to submit additional evidence at any point during VA's initial claims process, including during appeals on these claims to the Board of Veterans' Appeals. The submission of such evidence can result in delays because claims processors must further develop the claim and reevaluate the veteran's degree of disability.

Challenges to Improving Performance

In addition to the claims-processing system itself, VBA faces challenges to its efforts to improve timeliness and accuracy in claims processing. These include (1) claims characteristics that increase workloads, such as the number of disabilities claimed by veterans; (2) decisions by the U.S. Court of Appeals for Veterans Claims that expand claims-processing requirements; and (3) a significant number of retirements by experienced staff that will require VBA to train many new employees.

Certain Characteristics of Claims Increase Workloads

Veterans seeking compensation benefits often claim multiple disabilities. For example, in a sample of about 69,000 veterans whose initial claims were rated during

fiscal year 1998, VBA found that the veterans claimed a total of about 316,000 disabilities, or an average of about 4.6 disabilities per veteran; the largest number of disabilities claimed by an individual veteran was 56. To process these claims, regional office staff had to make about 316,000 separate decisions that required development of evidence; determination of whether the disability was service-connected; and, if the disability was found to be service-connected, evaluation of the degree of disability.

The number of disabilities determined to be service-connected has also been increasing. Of all the veterans who began receiving compensation benefits during fiscal year 1998, the average veteran had 2.72 service-connected disabilities. Compared with 1989, this represents an increase of about 30 percent in the number of service-connected disabilities per veteran.

The increase in the average number of service-connected disabilities per veteran may be due to several factors. For example, NAPA commented on the possible effects of VA's cooperative effort with the Department of Defense to perform medical examinations of veterans before their discharge from the service and to begin the claims process closer to the time of discharge. NAPA raised the possibility that these efforts potentially could result in the identification of a greater number of disabilities. The increase in disabilities per veteran also may be attributable in part to the recognition of new disabilities that are more difficult to evaluate. For example, the Agent Orange Act of 1991 presumed that anyone who served in Vietnam had been exposed to Agent Orange and extended compensation for certain diseases presumed to result from exposure. In another instance, the Veterans' Benefits Improvement Act of 1994 identified Gulf War Syndrome as a compensable

disability, which was the first time the Congress authorized VA to compensate veterans for "undiagnosed illnesses" for which only symptoms can be discerned. VBA data show that Gulf War veterans have more service-connected disabilities than any other group of veterans since World War II.

Another factor that drives regional office workloads is "repeat" (or subsequent) claims filed by veterans after their initial claims are decided. According to VBA, repeat claims include requests for reevaluation of disabilities previously claimed or the evaluation of new disabilities not claimed previously. In fiscal year 1998, veterans filing repeat claims outnumbered veterans filing initial claims by about three to one. Additionally, as mentioned, the number of service-connected disabilities per veteran has been increasing. This increases the potential for repeat claims because each additional disability represents the potential for a request for reevaluation.

Establishment of the U.S. Court of Appeals for Veterans Claims Heightened Complexity

Until the passage of the Veterans' Judicial Review Act in 1988, decisions by VA's Board of Veterans' Appeals were not subject to judicial review. The act, however, established the U.S. Court of Veterans Appeals (now known as the U.S. Court of Appeals for Veterans Claims) and gave veterans the right to appeal the Board's decisions to the Court.[6] As the Board found its own decisions being remanded by the Court,

[6] The name of the Court was changed under a provision of the Veterans' Programs Enhancement Act of 1998 (P.L. 105-368).

the Board in turn began remanding many more cases to the regional offices for rework. (As mentioned, not every remand indicates that the regional office made an error.) Before the Court was established, the Board annually had remanded less than 25 percent of the cases it reviewed; however, after the creation of the Court, the proportion of cases remanded by the Board reached as much as 50 percent. Recently, the remand rate has declined – for the first 4 months of fiscal year 2000, the remand rate was about 29 percent, according to VBA and Board officials.

Perhaps more importantly, the Court's decisions also contributed to substantial increases in the time required to process claims. According to the Veterans' Claims Adjudication Commission, VA historically has lacked clear and definitive administrative procedures, but prior to creation of the Court, VA's vague rules had not been a problem because the rules were subject only to VA's interpretation. The Court's interpretation, however, of statutory and regulatory provisions generally has been more expansive than VA's and has imposed greater procedural and documentation requirements on VA. For example, before the Court's creation, regional office staff generally wrote one brief statement for each claim that summarized their overall evaluation and rating of all disability issues. Now, regional staff must separately describe the evidence and the decision rationale for each disability issue. The Adjudication Commission's 1996 report stated that the number of work hours required to process the average case had doubled since the creation of the Court. Consistent with this finding, VBA data show that the number of decisions produced per rating specialist in fiscal year 1999

(797 decisions) was less than half the number produced 10 years earlier in fiscal year 1989 (1,716 decisions).

Wave of Retirements Presents Challenges for VBA's Training Program

According to VBA, it takes 2 to 3 years of experience for claims decisionmakers to achieve a fully productive level of expertise. Currently, about half of such VBA staff have 3 years or less of decision-making experience. The proportion of less experienced decisionmakers is likely to increase in the near future because of the expected retirement of over 1,100 experienced decisionmakers in the next 5 years. In the current fiscal year, VBA will add 440 new staff to the compensation and pension programs. In fiscal year 2001, VBA plans to redirect 183 existing staff positions to compensation and pension claims processing and hire 243 new staff. This highlights the need for an effective claims-processing training program. VBA has acknowledged that its training program has not adequately prepared its workforce to produce accurate disability decisions, and VBA has recognized the need for an effective, centralized, and comprehensive training program.

Effectiveness of VBA's Performance Improvement Initiatives Remains Unclear

VBA has acknowledged the need to improve the timeliness and accuracy of claims processing. Accordingly, VBA has an ongoing effort to reengineer the initial disability claims process as well as other initiatives aimed at improving performance. At this point, however, VBA's initiatives are in various stages of testing and implementation, and it is not clear whether or to what extent these initiatives will improve timeliness or accuracy. Also, in some cases, VBA

may need additional data to identify the underlying causes of its claims-processing problems. For example, as we reported in March 1999, VBA could further improve its claims-processing accuracy measurement system by collecting more specific data that would help identify error-prone cases and target corrective actions.[7]

VBA's initiatives for improving claims processing encompass efforts such as implementing a case management approach for processing claims; working with the Department of Defense to administer physical examinations before servicemembers are discharged from military service; using electronic networks to obtain existing military service and medical records; improving the guidance and training for VHA physicians; developing computer-based training modules for regional office staff; and instituting a "balanced scorecard" that measures program performance on the basis of claims-processing accuracy and timeliness as well as unit cost, customer satisfaction, and employee development.

In addition, during fiscal years 1986 through 1999, VBA spent at least $380 million to modernize its information technology systems to support its operations.[8] Of the $380 million, at least $28 million was spent on initiatives specifically intended to improve compensation claims processing, from the establishment of claims through

[7] *Veterans' Benefits Claims: Further Improvements Needed in Claims-Processing Accuracy* (GAO/HEHS-99-35, Mar. 1, 1999).

[8] Our analysis of VBA's modernization obligations shows that the cost of these activities may be understated because VBA lacks a managerial cost-accounting system to track payroll benefits and indirect costs associated with modernization.

benefit payment and accounting. These initiatives are at various stages of completion. For example, in 1996 VBA implemented an initiative to track the location of veterans' claims folders. Since then, VBA has been developing a system to replace the compensation and pension payment system.

Also, in February 1999 VBA began testing the use of a case management approach to claims processing at six demonstration sites. As part of this test, VBA is using two automated tools: (1) the Claims Processing System applies rule-based technology to identify necessary evidence when a claim is initially received and produces reader-friendly letters requesting evidence and (2) the Claims Automated Processing System collects and stores information about pending claims. In August 1999 VBA completed a 6-month assessment of the demonstration project and concluded that neither system had any discernible effect on performance measures such as pending workload, timeliness, and productivity. VBA found that the Claims Processing System was labor intensive and had system access problems. It also found that the Claims Automated Processing System could not produce some management reports; this problem, according to VBA, has been fixed. According to a recent status report on its efforts to reengineer claims processing, VBA plans to continue using the Claims Automated Processing System to assist employees in providing case management services, but VBA discontinued the mandatory use of the rule-based Claims Processing System at the demonstration sites.

Despite VBA's efforts to improve its performance, its timeliness problems in claims processing continue and its accuracy in claims processing has far to go to reach VBA's strategic goal for accuracy. At present, it is unclear how

much improvement will be gained through VBA's initiatives. Also, while VBA has improved its data collection efforts, it may still need to collect and analyze additional data, such as specific information on error-prone cases, to further understand its claims processing problems and better target corrective actions. Furthermore, as we mentioned in last year's testimony before the Subcommittee on Benefits, some issues affecting VBA's performance are not in its direct control and are a function of the design of the program.[9] As a result, it may be that only incremental gains can be made without changes in the current design of the program.

Mr. Chairman, this concludes my prepared remarks. I would be pleased to respond to any questions you or Members of the Subcommittee may have.

GAO Contact and Staff Acknowledgments

For future contacts regarding this testimony, please call Cynthia A. Bascetta at (202) 512-7101. Others who made key contributions to this testimony are Irene Chu, Tonia Johnson, Helen Lew, Steve Morris, Barbara Oliver, Martin Scire, Ira Spears, Henry Sutanto, and Paul Wright.

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[9] *Veterans Benefits Administration: Progress Encouraging, but Challenges Still Remain* (GAO/T-HEHS-99-77, Mar. 25, 1999).

VA's Initial Compensation Claims Process

Figures 3a through 3i depict the initial compensation claims process. A list of abbreviations and forms referred to in the figures is included after figure 3i.

Figure 3a: Process Legend

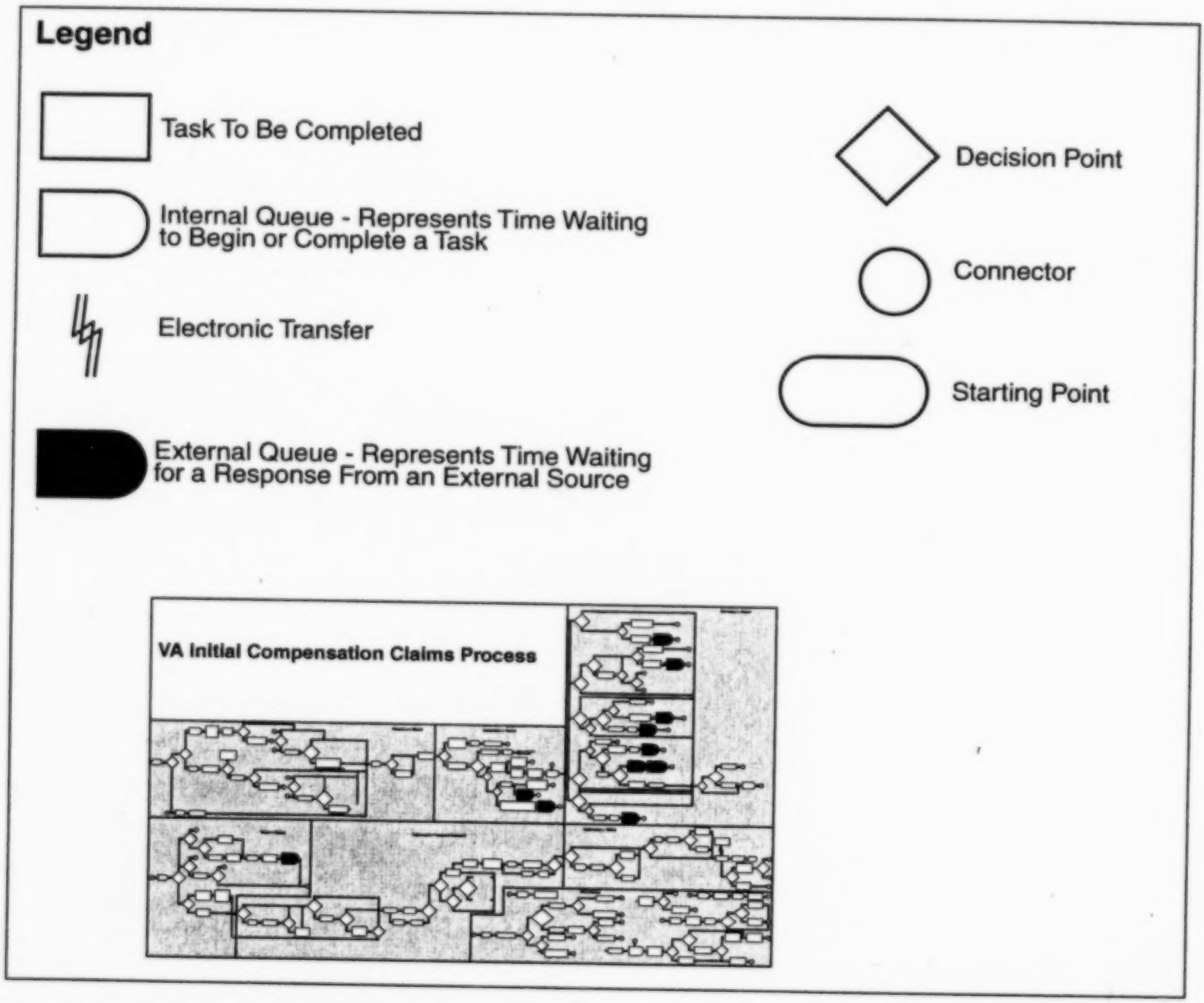


Figure 3b: Receive a Claim

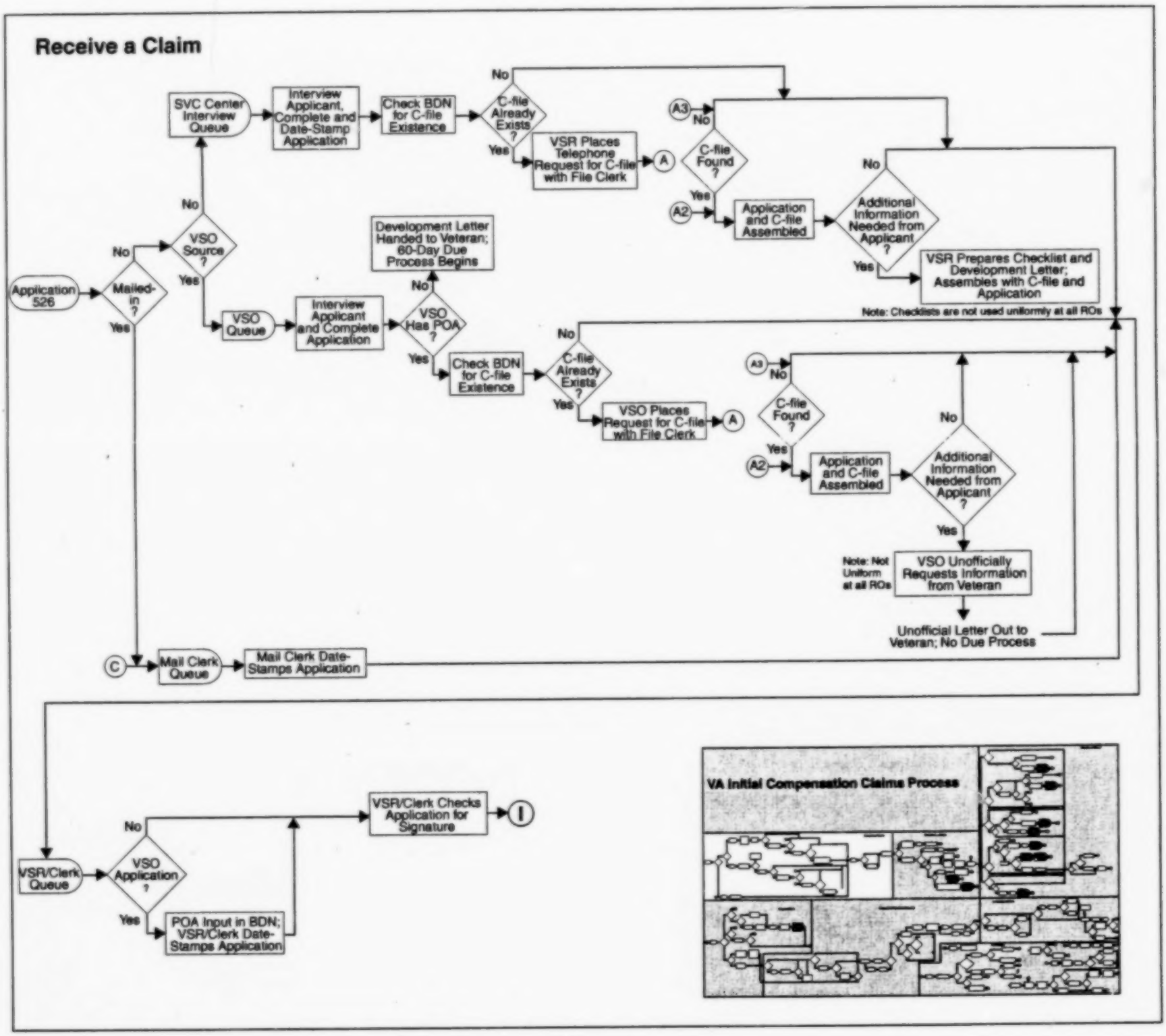


Figure 3c: Establish a Claim

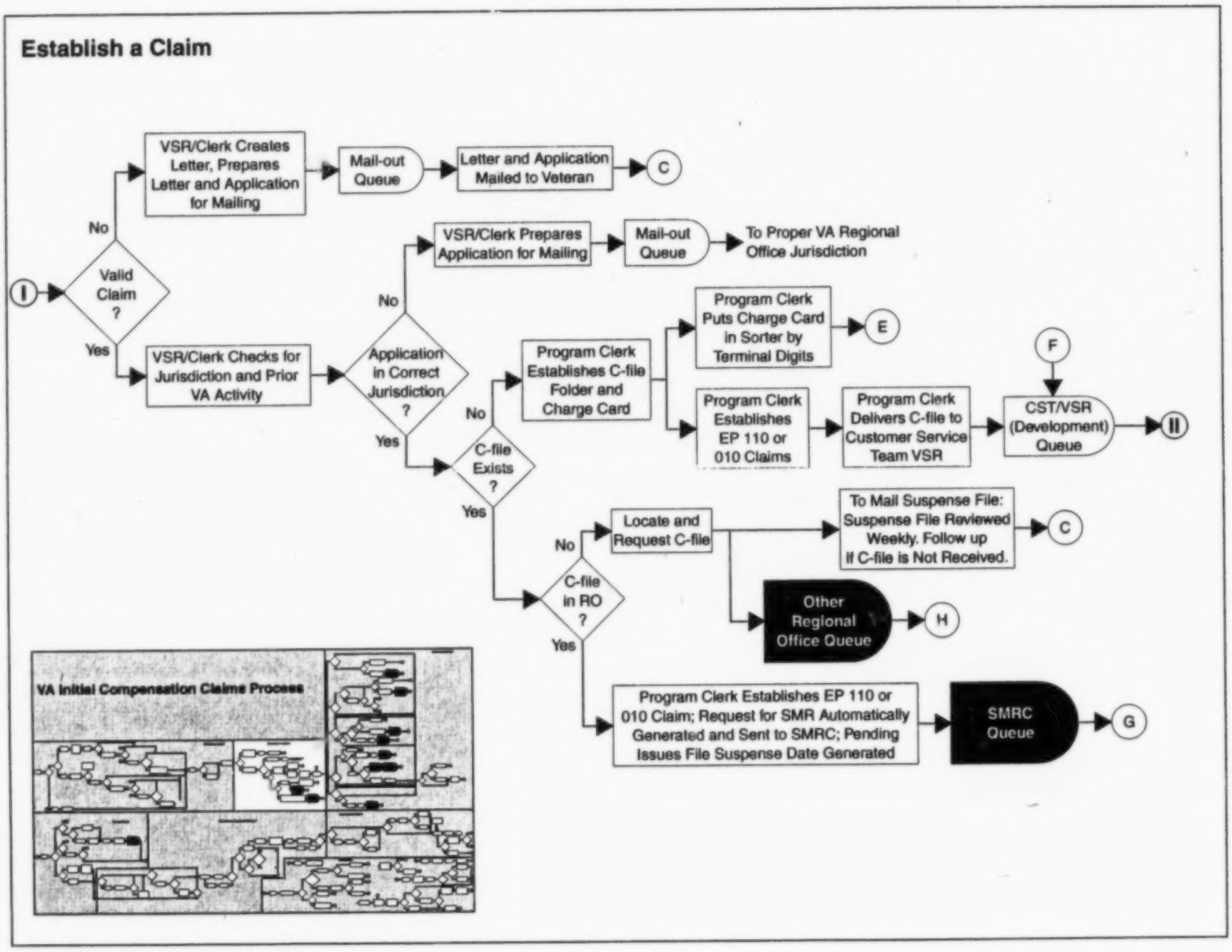


Figure 3d: Develop a Claim (Part 1)

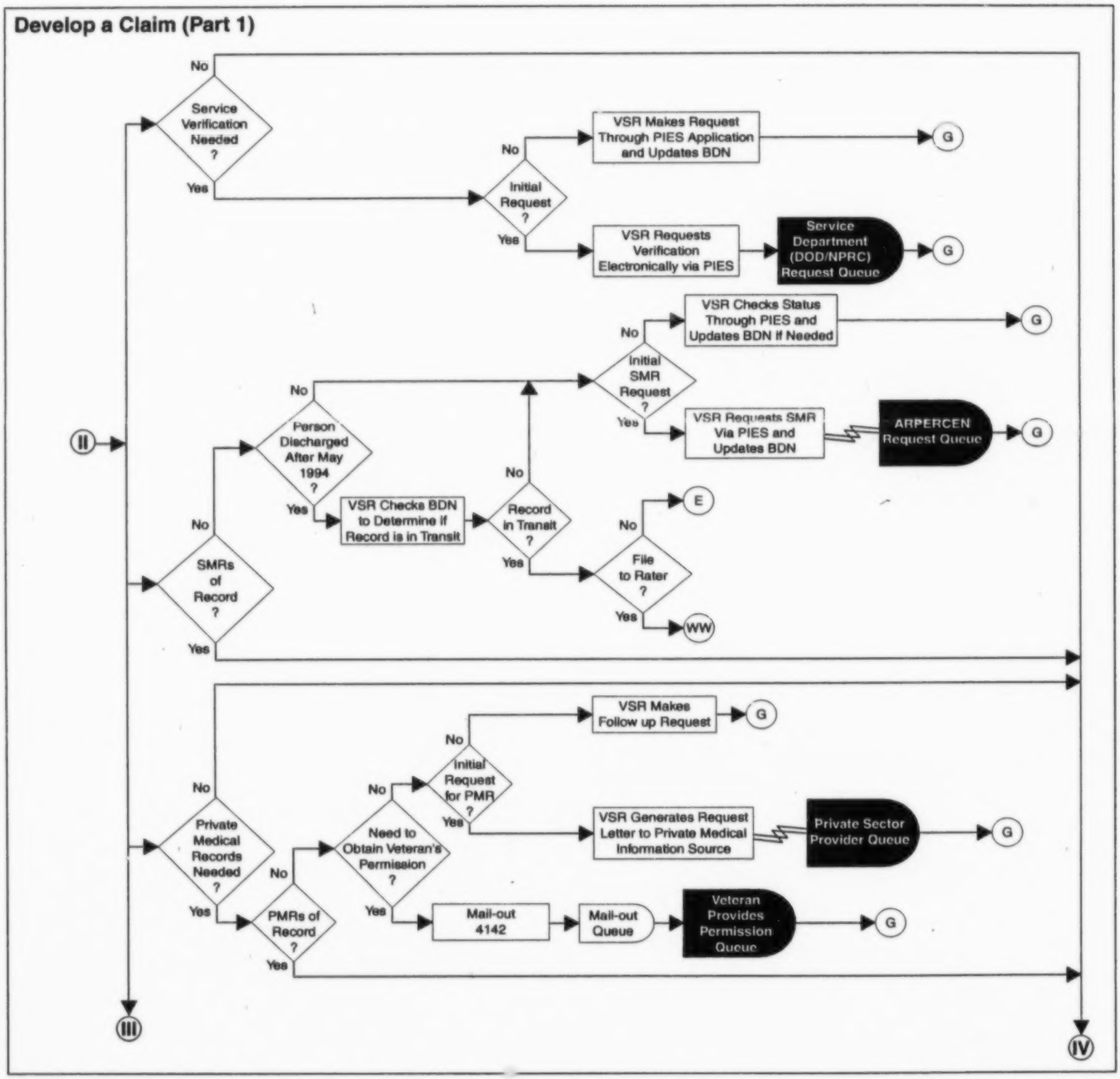


Figure 3e: Develop a Claim (Part 2)

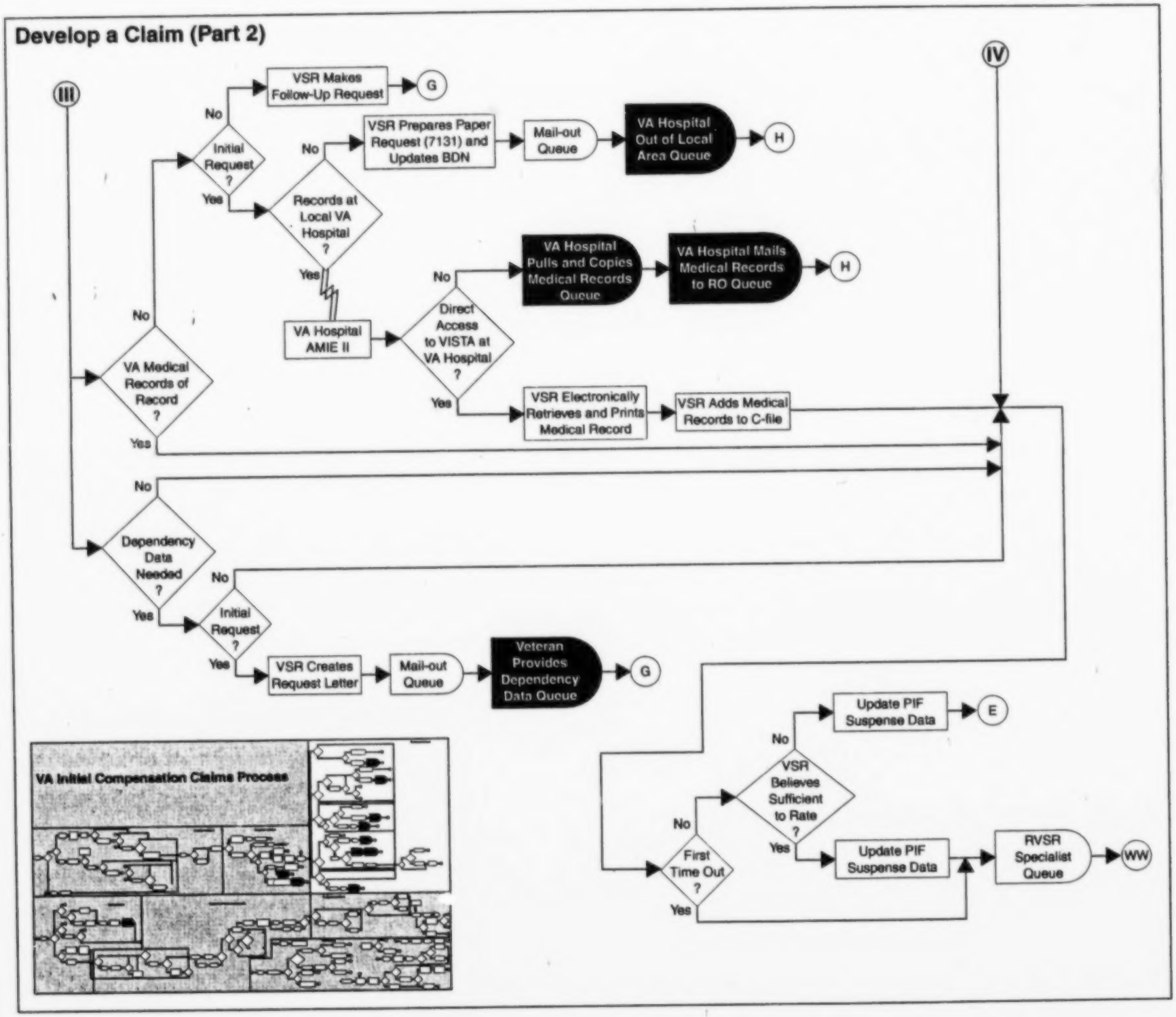


Figure 3f: Rate a Claim

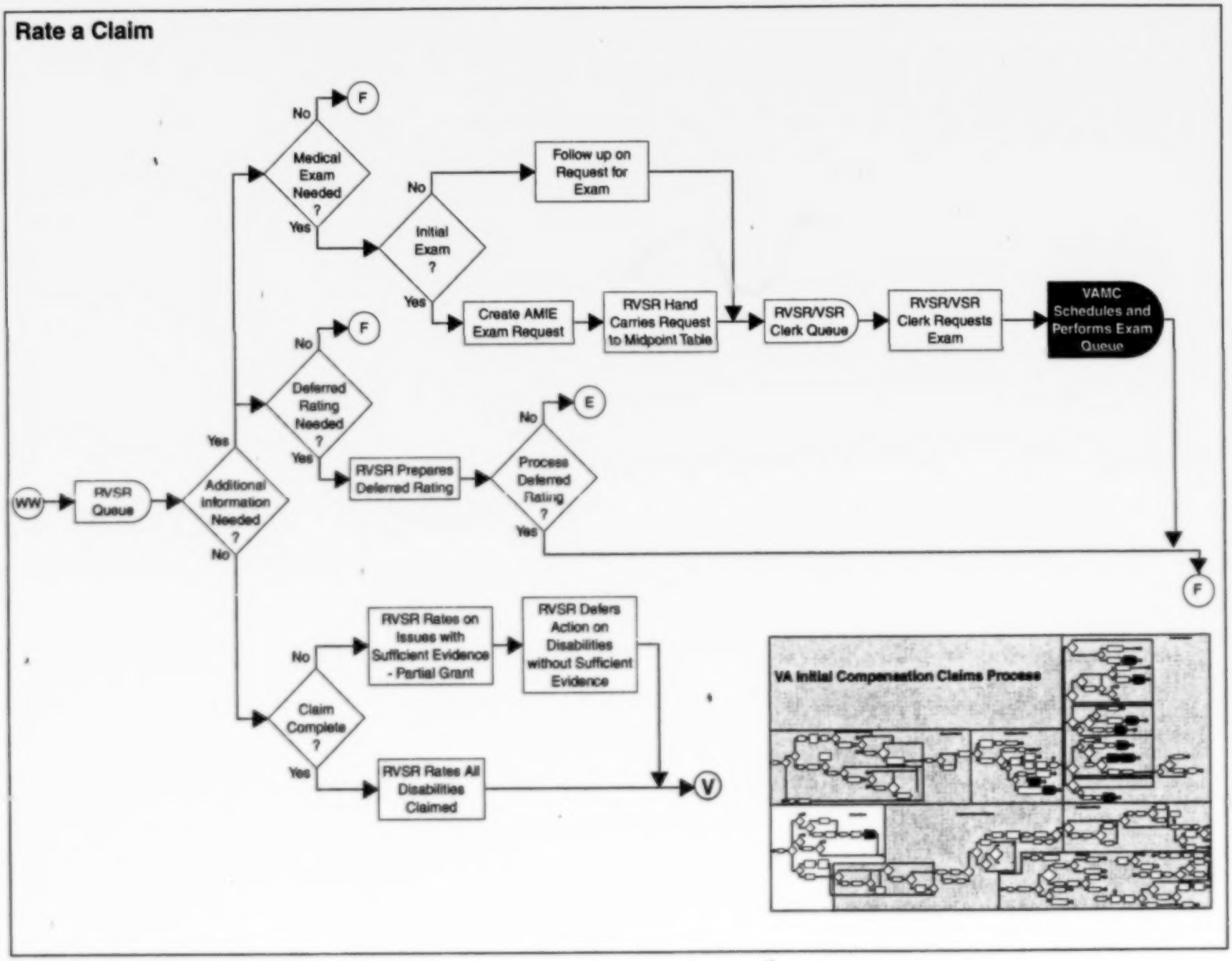


Figure 3g: Determine Payment Amount

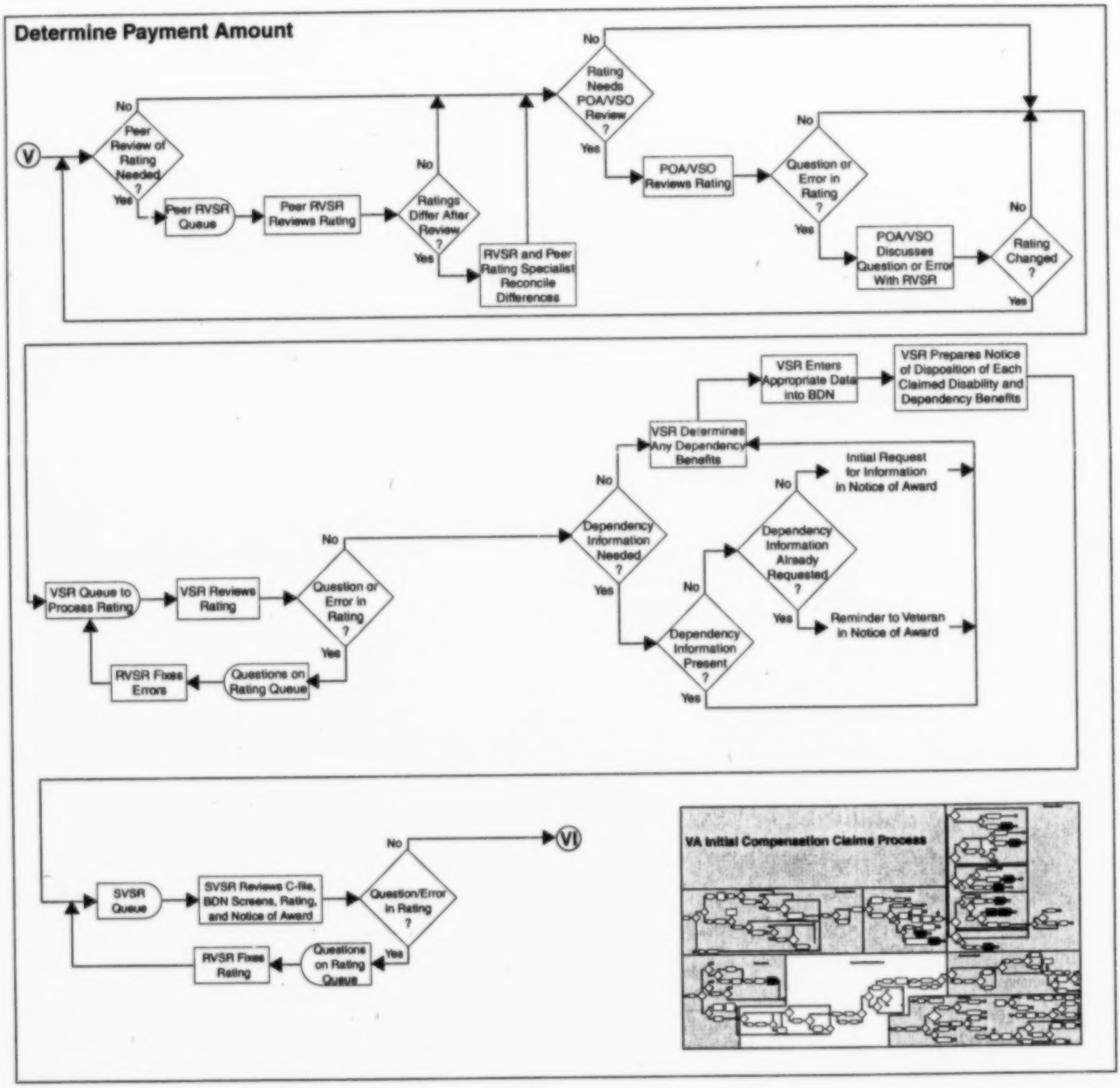


Figure 3h: Authorize a Claim

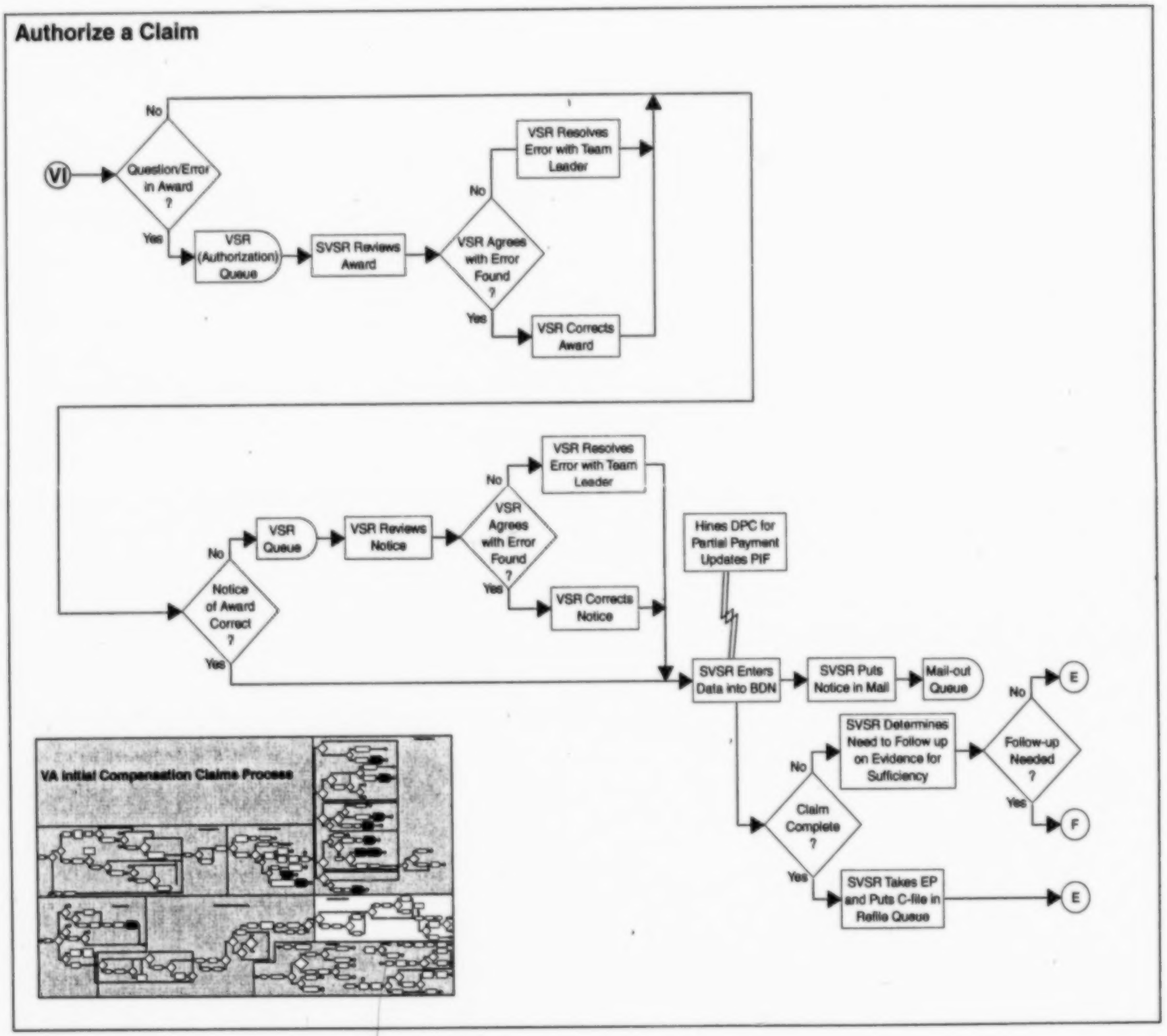
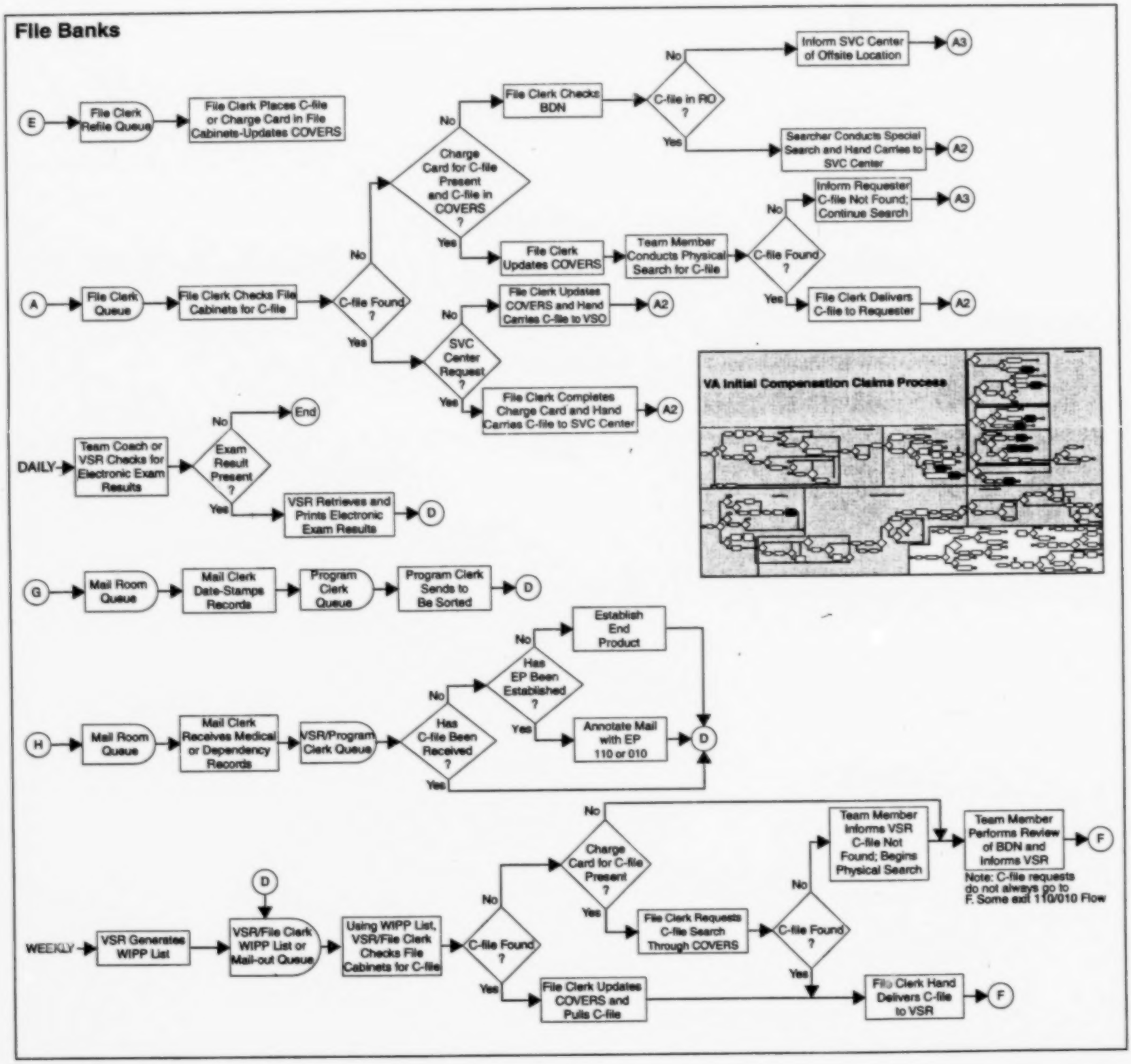


Figure 3i: File Banks



28a

VA's Initial Compensation Claims Process

Abbreviations

AMIE	Automated Medical Information Exchange
ARPERCEN	Army Reserve Personnel Records Center
BDN	Benefits Delivery Network
C-file	claims file
COVERS	Control of Veterans Records System
CST/VSR	customer service team/veterans service representative
DOD	Department of Defense
EP	end product (claims control)
Hines DPC	Hines (Ill.) Data Processing Center
NPRC	National Personnel Records Center
PIES	Personnel Information Exchange System
PIF	pending issues file
PMR	private medical records
POA	power of attorney
RO	regional office
RVSR	rating certified veterans service representative
SMR	service medical records
SMRC	service medical records center
SVC	service center
SVSR	senior veterans service representative
VISTA	Veterans Health Information Systems and Technology Architecture
VSO	veterans' service organization
VSR	veterans service representative
WIPP	work in progress

Forms

010	Original service-connected compensation claim with more than seven issues
110	Original service-connected compensation claim with seven issues or fewer

526	Veterans' application for service-connected disability compensation and nonservice-connected pension benefits
4142	Veterans' release of information (permission) form to obtain medical records from a private physician or hospital
7131	Request (electronic or hard copy) for medical records from a VA medical facility

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IN THE

Supreme Court of the United States

GALE NORTON, Secretary of the Interior, *et al.*,

Petitioners,

v.

SOUTHERN UTAH WILDERNESS ALLIANCE, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF OF AMICI CURIAE NATURAL RESOURCES DEFENSE COUNCIL, NATIONAL WILDLIFE FEDERATION, CENTER FOR BIOLOGICAL DIVERSITY, CALIFORNIA WILDERNESS COALITION, IDAHO CONSERVATION LEAGUE, MINNESOTA CENTER FOR ENVIRONMENTAL ADVOCACY, NORTHWEST ENVIRONMENTAL DEFENSE CENTER, OREGON NATURAL DESERT ASSOCIATION, AND WESTERN LAND EXCHANGE PROJECT IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

	Page
Table Of Cited Authorities	iv
Common Acronyms	xiii
Interest Of The Amici Curiae	1
Introduction	2
Background On ORV Impacts	3
Summary Of Argument	7
Argument	9
I. The APA Provides Federal Courts With Subject Matter Jurisdiction Over Respondents' FLPMA Claims	9
A. FLPMA Obligates BLM To Administer Certain Lands "So As Not To Impair The Suitability Of Such Areas For Preservation As Wilderness"	9
1. The IMP Requires BLM To Take Final Agency Action To Prevent Impairment And Fulfill Its Obligations Under FLPMA	14
B. BLM's Failure To Fulfill Its Duties Under FLPMA And The IMP Constitutes Agency Inaction Subject To Review Under Section 706(1)	17

Contents

Page

1. FLPMA And The IMP Identify Mandatory, Non-Discretionary Duties That BLM Must Perform .. 17

2. SUWA Seeks To Compel Final Agency Action 18

3. The Discretion Provided By FLPMA Does Not Deny A Court Jurisdiction To Compel BLM To Comply With FLPMA's Mandatory, Non-Discretionary Duties 19

4. BLM Is Not Immune From Judicial Review Because It Has Taken "Some" Action 20

C. BLM's Failure To Fulfill Its Duties Under The Land Use Plans Constitutes Agency Inaction Subject To Review Under Section 706(1) 21

D. The Judgment Of The Tenth Circuit Should Be Affirmed 21

Contents

Page

II. The APA Provides The Federal Courts With Subject Matter Jurisdiction Over Respondents' NEPA Claims 22

A. NEPA Imposes Mandatory, Non-Discretionary Duties On BLM 22

B. BLM's Failure To Fulfill Its Duties Under NEPA Constitutes Agency Inaction Subject To Review Under Section 706(1) 24

1. BLM's Failure To Take A "Hard Look" Is Reviewable Under Section 706(1) As "Action Unlawfully Withheld Or Unreasonably Delayed" 26

2. BLM's Failure To Take A "Hard Look" Is Not Excused By An Alleged Absence Of New "Major Federal Action" 28

C. The Judgment Of The Tenth Circuit Should Be Affirmed 30

Conclusion 30

TABLE OF CITED AUTHORITIES

Page

Cases

Abbott Labs. v. Gardner, 387 U.S. 136 (1967) 28

Bennett v. Spear, 520 U.S. 154 (1997) 27

Chevron U.S.A. v. Natural Res. Def. Council, 467 U.S. 837 (1984) 14, 17, 20

Ctr. for Biological Diversity v. Veneman, 335 F.3d 849 (9th Cir. 2003) 20

Friends of the Clearwater v. Dombeck, 222 F.3d 552 (9th Cir. 2000) 28

Hughes River Watershed Conservancy v. Glickman, 81 F.3d 437 (4th Cir. 1996) 24

Kleppe v. Sierra Club, 427 U.S. 390 (1976) 22

Marsh v. Or. Natural Res. Council, 490 U.S. 360 (1989) 8, 23, 24, 29, 30

Montana Wilderness Ass'n v. United States Forest Serv., 314 F.3d 1146 (9th Cir. 2003) 20

Portland Audubon Soc'y v. Lujan, 795 F.Supp. 1489 (D. Or. 1992) *aff'd sub nom. Portland Audubon Soc'y v. Babbitt*, 998 F.2d 705 (9th Cir. 1993) ... 28

Page

Robertson v. Methow Valley Citizens Council, 490 U.S. 332 (1989) 22, 28

Rocky Mountain Oil & Gas Ass'n v. Watt, 696 F.2d 734 (10th Cir. 1982) 14

S. Trenton Residents Against 29 v. Fed. Highway Admin., 176 F.3d 658 (3d Cir. 1999) 24

S. Utah Wilderness Alliance v. Babbitt, 2000 WL 33914094 (D. Utah, Dec. 22, 2000) 16, 20, 24, 25

S. Utah Wilderness Alliance v. Norton, 301 F.3d 1217 (10th Cir. 2002) ..... *passim*

Sierra Club v. Clark, 774 F.2d 1406 (10th Cir. 1985) 14

Sierra Club v. Glickman, 156 F.3d 606 (5th Cir. 1998) 26

Sierra Club v. Peterson, 228 F.3d 559 (5th Cir. 2000) 19

Telecomms. Research and Action Ctr. v. FCC, 750 F.2d 70 (D.C. Cir. 1984) 28

Village of Grand View v. Skinner, 947 F.2d 651 (2d Cir. 1991) 24

Page

Vitarelli v. Seaton, 359 U.S. 535 (1959) 18

Wisconsin v. Weinberger, 745 F.2d 412 (7th Cir. 1984) 28

Statutes and Legislative Materials

5 U.S.C. § 551 ..... 1, 26

5 U.S.C. § 701(b)(2) 26

5 U.S.C. § 706(1) ..... *passim*

5 U.S.C. § 706(2) 18, 27

16 U.S.C. § 1131 ..... 1, 10, 11

42 U.S.C. § 4321 ..... 1, 22

42 U.S.C. § 4332(2)(C) 22, 29

42 U.S.C. § 4342 22

43 U.S.C. § 1701 ..... 1, 9, 10

43 U.S.C. § 1711(a) 9, 12

43 U.S.C. § 1712 ..... 8, 9

43 U.S.C. § 1732(a) 8, 9, 21

Page

43 U.S.C. § 1782 10

43 U.S.C. § 1782(a) 13

43 U.S.C. § 1782(b) 13

43 U.S.C. § 1782(c) ..... *passim*

H.R. Rep. No 94-1163 (1976) 10

Executive and Regulatory Materials

40 C.F.R. 1501 23

40 C.F.R. 1502 ..... *passim*

40 C.F.R. 1508 ..... 23, 29

Exec. Order No. 11514 §3(h), 40 C.F.R. pt. 1500, *reprinted in* 42 U.S.C. § 4321 22

Interim Management Policy and Guidelines for Land Under Wilderness Review, 44 Fed. Reg. 72,014 (Dec. 12, 1979) 7-8

U.S. Dep't of Agric., Forest Serv., *National OHV Policy & Implementation Teams: On the Right Trail! Managing Off-Highway Vehicles* (Jan. 7, 2004) 4

Cited Authorities

	Page
U.S. Dep't of Interior, Bureau of Land Mgmt., No. BLM/BC/ST-03/001+1165, *Public Land Statistics 2002* (Apr. 2003)	14
U.S. Dep't of Interior, Bureau of Land Mgmt., No. H-8550-1, *Interim Management Policy For Lands Under Wilderness Review* (1995)	14
U.S. Dep't of Interior, Bureau of Land Mgmt., No. UT-100-3-EA-04, *Environmental Assessment for Ft. Pearce Ridge Trail Designation* at 1 (Mar. 2003)	4
U.S. Dep't of Interior, Bureau of Land Mgmt., *Utah Wilderness Questions & Answers*	13

Other Authorities

	Page
A Letter from Economists to President Bush and the Governors of Eleven Western States Regarding the Economic Importance of the West's Natural Environment (Dec. 3, 2003)	12
Michael H. Anderson & Aliki Moncrief, *America's Unprotected Wilderness*, 76 Denv. U. L. Rev. 413 (1999)	13
Jayne Belnap, *Recovery Rates of Cryptobiotic Crusts: Inoculant Use and Assessment Methods*, 53 Great Basin Naturalist 89 (1993)	5

Cited Authorities

	Page
Kristin H. Berry, *A Review of the Effects of Off-Road Vehicles on Birds and Other Vertebrates, in Management of Western Forests and Grasslands for Nongame Birds*, Forest Serv., U.S. Dep't of Agric., Forest Serv. Gen. Tech. Rep. INT-86 at 451 (1980)	5, 7
Bayard H. Brattstrom and Michael C. Bandello, *Effects of Off-Road Vehicle Noise on Desert Vertebrates, in Environmental Effects of Off-Road Vehicles: Impacts and Management in Arid Regions* 167 (Robert H. Webb and Howard G. Wilshire eds., 1983)	7
Matthew L. Brooks, *Benefits of Protective Fencing to Plant and Rodent Communities of the Western Mojave Desert, California*, 19 Envtl. Mgmt. 65 (1995)	7
R. Bruce Bury, Roger A. Luckenbach, and Stephen D. Busack, *Effects of Off-Road Vehicles on Vertebrates in the California Desert*, 8 U.S. Fish and Wildlife Serv. Rep. at 1 (1977)	6
Stephen D. Busack and R. Bruce Bury, *Some Effects of Off-Road Vehicles and Sheep Grazing on Lizard Populations in the Mojave Desert*, 6 Biological Conservation 179 (July 1974)	6, 7

Cited Authorities

Page

Christopher A. Clampitt, *Effects of Human Disturbances on Prairies and the Regional Endemic* Aster curtus *in Western Washington*, 67 Nw.-Sci. 163 (1993) 6

Conservation Biology Inst., *Importance of Bureau of Land Management Roadless Areas in the Western U.S.A.* (Mar. 2000) 5

Eric Davidson and Martha Fox, *Effects of Off-Road Motorcycle Activity On Mojave Desert Vegetation and Soil*, 22 Madroño 381 (Oct. 1974) 5, 6

R.E. Eckert, *et al.*, *Impacts of Off-Road Vehicles on Infiltration and Sediment Production of Two Desert Soils*, 32 J. of Range Mgmt. 394 (Sept. 1979) 5

D. Michael Harvey, *Exempt from Public Haunt: The Wilderness Study Provisions of the Federal Land Policy and Management Act*, 16 Idaho L. Rev. 481 (1980) 9

David G. Havlick, *No Place Distant: Roads and Motorized Recreation on America's Public Lands* 85 (2002) 4, 5

Bern S. Hinkley *et al.*, *Accelerated Water Erosion in ORV-Use Areas, in Environmental Effects of Off-Road Vehicles: Impacts and Management in Arid Regions* 81 (Robert H. Webb and Howard G. Wilshire eds., 1983) 6

Cited Authorities

Page

Earl W. Lanthrop, *The Effect of Vehicle Use on Desert Vegetation, in Environmental Effects of Off-Road Vehicles: Impacts and Management in Arid Regions* 149 (Robert H. Webb and Howard G. Wilshire eds., 1983) 6

Paul A. Lorah, *Population Growth, Economic Security, and Cultural Change in Wilderness Counties, in Wilderness Science in a Time of Change Conference*, U.S. Dep't of Agric., Forest Serv. No. RMRS-P-15-VOL-2 at 230 (May 1999) 12

Roger A. Luckenbach, *An Analysis of Off-road Vehicle Use on Desert Avifaunas*, 43 Transactions of the N. Am. Wildlife Conf. 157 (1978) 6

Thomas Michael Power, *"Gifts of Nature" in an Economic World, in Return of the Wild: The Future of Our Natural Lands* 55 (Ted Kerasote, ed. 2001) 12

Patrick A. Shea, *Foreword: Symposium: Wilderness Act of 1964: Reflections, Applications, and Predictions*, 76 Denv. U. L. Rev. 331 (1999) ... 11

David Sheridan, Council on Envtl. Quality, *Off-Road Vehicles on Public Land* 7 (1979) 4

Cited Authorities

	Page
Wallace Stegner, *Wilderness Letter, in The Sound of Mountain Water* 145 (1997)	12
Jason Tanz, *Making Tracks, Making Enemies*, N.Y. Times, Jan. 2, 2004, at F1	4
Robert H. Webb, *Compaction of Desert Soils by Off-Road Vehicles, in Environmental Effects of Off-Road Vehicles: Impacts and Management in Arid Regions* 51 (Robert H. Webb and Howard G. Wilshire eds., 1983)	5, 6, 7
George F. Will, *A Word for the Wilderness*, Newsweek, Aug. 19 1982, at 68	12
H. G. Wilshire and J. K. Nakata, *Off-Road Vehicle Effects on California's Mojave Desert*, 29 Cal. Geology 123 (June 1976)	5, 6
Howard G. Wilshire, *The Impact of Vehicles on Desert Soil Stabilizers, in Environmental Effects of Off-Road Vehicles: Impacts and Management in Arid Regions* 31 (Robert H. Webb and Howard G. Wilshire eds., 1983)	5

Common Acronyms

APA	Administrative Procedure Act
BLM	Bureau of Land Management
EA	Environmental Assessment
EIS	Environmental Impact Statement
FLPMA	Federal Land Policy and Management Act of 1976
FONSI	Finding Of No Significant Impact
IMP	Interim Management Policy and Guidelines for Land Under Wilderness Review
LUP	Land Use Plan
NEPA	National Environmental Policy Act of 1969
OHV	Off-Highway Vehicle
ORV	Off-Road Vehicle
RMP	Resource Management Plan
SEIS	Supplemental Environmental Impact Statement
SUWA	Respondents Southern Utah Wilderness Alliance, *et al.*
WSA	Wilderness Study Area

INTEREST OF THE AMICI CURIAE

The Natural Resources Defense Council, National Wildlife Federation, Center for Biological Diversity, California Wilderness Coalition, Idaho Conservation League, Minnesota Center for Environmental Advocacy, Northwest Environmental Defense Center, Oregon Natural Desert Association, and Western Land Exchange Project (collectively, "*Amici*") are not-for-profit public interest organizations that, *inter alia*, work to protect the environment and preserve the nation's remaining wilderness.[1] *Amici*'s work includes advocating passage of legislation formally designating wilderness, persuading agencies to adopt regulations and policies protective of wilderness, litigating to prevent illegal degradation of wilderness, and educating and organizing the public to support the protection of wilderness. *Amici* regularly rely on the judicial review provisions of the Administrative Procedure Act ("APA"), 5 U.S.C. § 551 *et seq.*, to seek enforcement of environmental laws such as the Federal Land Policy and Management Act of 1976 ("FLPMA"), 43 U.S.C. § 1701 *et seq.*, and the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. § 4321 *et seq*. *Amici*'s members regularly visit public lands managed by the Bureau of Land Management ("BLM") to recreate and enjoy land "untrammeled by man, where man himself is a visitor who does not remain." Wilderness Act, 16 U.S.C. § 1131(c).

Amici, who together have nearly 1.5 million members, submit this brief to provide background information on off-road vehicles ("ORVs") and their environmental effects, and to discuss the structure and purpose of FLPMA and NEPA, especially as they relate to BLM and its regulation of ORVs.

---

1. Counsel for the parties have consented to the filing of this *amici curiae* brief, and the letters of consent have been filed with the Clerk of the Court. Pursuant to Supreme Court Rule 37.6, *Amici* state that no counsel for a party has authored this brief in whole or in part, and that no person or entity other than *Amici*, their members, or their counsel has made a monetary contribution to the preparation or submission of this brief.

INTRODUCTION

FLPMA requires BLM to manage certain public lands "in a manner so as not to impair the suitability of such areas for preservation as wilderness." 43 U.S.C. § 1782(c). Yet Petitioners propose a new rule of law under which BLM could allow these potential wilderness areas—a limited natural resource of incalculable value—to be destroyed with impunity. The Tenth Circuit appropriately described Petitioners' proposal as an attempt to create "a 'no-man's-land' of judicial review." *S. Utah Wilderness Alliance v. Norton*, 301 F.3d 1217, 1230 n.10 (10th Cir. 2002).

At issue is whether a court may compel an administrative agency to perform a mandatory, non-discretionary duty—in this case, BLM's duty to prevent the impairment of potential wilderness areas. Petitioners argue that even if BLM is failing to prevent impairment, no court may compel BLM to do otherwise because (1) a court only may compel that which would be final agency action, and (2) any court order compelling BLM to undertake final agency action to prevent impairment would be an impermissible encroachment on BLM's discretion in deciding how to prevent impairment.

But even assuming that Petitioners' first argument is correct—which it is not—Petitioners' manufactured conflict is illusory, and easily dismantled. If impairment is occurring, a court simply may order the agency to stop such impairment. Petitioners concede that such an order would be appropriate,[2] and given both the record here and BLM's own interpretation of FLPMA, such an order would necessarily entail BLM taking final agency action in the form of restricting or closing areas to ORV use. Similarly, because BLM's own interpretation of

2. *See* Brief for Petitioners ("Pet. Br.") at 12 ("a court may direct an agency *to act* when action is clearly required by law" (emphasis in original)). All citations to Petitioners' brief refer to the pagination in the brief filed with the Court on January 5, 2004, which Petitioners formatted according to Supreme Court Rule 33.2.

FLPMA and the record here require as much, a court may specifically order BLM to decide in a formal document whether to restrict or close roads to ORV use to prevent impairment. Petitioners concede that a court would be ordering final agency action in this instance as well.[3]

Petitioners' proposed rule of law for NEPA is just as untenable as their proposed rule for FLPMA. NEPA obliges federal agencies to consider the environmental impacts of their actions. In defiance of this obligation, BLM has refused to take a "hard look" at evidence that increased ORV use has rendered obsolete certain of its NEPA documents. Trying to defend BLM's intransigence, Petitioners seek to characterize "hard looks" as not subject to compulsion by court order. Yet a "hard look" is precisely the sort of mandatory, ministerial obligation that Petitioners concede is appropriate for a court to order.[4]

The rules of law that Petitioners propose are contrary to the letter and spirit of FLPMA, NEPA, and the APA, and should be rejected. The judgment of the court of appeals should be affirmed.

BACKGROUND ON ORV IMPACTS

In 1979, the White House Council on Environmental Quality ("CEQ") published a report summarizing the environmental harm caused by ORVs:[5]

> ORVs have damaged every kind of ecosystem found in the United States: sand dunes covered with American beach grass on Cape Cod; pine and cyprus

3. *See* Pet. Br. at 12, 55-56; Brief for Respondents Utah Shared Access Alliance, *et al.*, at 14-15.

4. *See* Pet. Br. at 27.

5. The term "ORVs" refers to motorized vehicles such as motorcycles, minibikes, trail bikes, dune-buggies, three- and four-wheel all-terrain vehicles, and jeeps that are used to navigate over roadless land and primitive throughways.

> woodlands in Florida; hardwood forests in Indiana; prairie grasslands in Montana; chaparral and sagebrush hills in Arizona; alpine meadows in Colorado; conifer forests in Washington; arctic tundra in Alaska. In some cases, the wounds will heal naturally; in others they will not, at least for millennia.
>
> Remnant wild and semiwild areas near urban environments in the West have been particularly hard hit by ORVs.

David Sheridan, Council on Envtl. Quality, *Off-Road Vehicles on Public Land* 7 (1979). In the twenty-five years since CEQ's report was published, ORVs have become more powerful, faster, and capable of intruding even further into the most remote and ecologically pristine wilderness areas.[6] They also have become much more popular,[7] resulting in significant and widespread environmental harm.

The deleterious effects of ORVs are well documented, and are particularly pronounced in desert and shrubland ecosystems, such as the public lands in the State of Utah that are at issue in

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6. *See* David G. Havlick, *No Place Distant: Roads and Motorized Recreation on America's Public Lands* 85 (2002).

7. *See, e.g.*, Jason Tanz, *Making Tracks, Making Enemies*, N.Y. Times, Jan. 2, 2004, at F1 ("[O]ver the last few decades the popularity of off-roading has exploded. According to the Motorcycle Industry Council, a trade organization, sales of off-highway motorcycles increased 146 percent from 1998 to 2002, while Americans bought 847,000 A.T.V.'s in 2002, up from 447,000 four years before."); *see also* U.S. Dep't of Agric., Forest Serv., *National OHV Policy & Implementation Teams: On the Right Trail! Managing Off-Highway Vehicles*, at 2 (Jan. 7, 2004) (describing ORV trend), *available at* http://www.fs.fed.us/r10/tongass/districts/sitka/ohv_policy.htm; U.S. Dep't of Interior, Bureau of Land Mgmt., No. UT-100-3-EA-04, *Environmental Assessment for Ft. Pearce Ridge Trail Designation* at 1 (Mar. 2003) (same); Havlick, *supra* note 6, at 88-90 (same).

this case.[8] Specifically, ORVs cause intense soil disruption and compaction, which reduces moisture infiltration rates, soil porosity and soil permeability, and impedes seed germination and seedling growth.[9] In areas with arid soils, ORVs can damage fragile cryptobiotic crusts that help stabilize the soil, which may take from 40 to 250 years to recover.[10] ORVs are also heavy polluters; it is estimated that ORVs spill tens of millions of gallons of gasoline and oil on public lands in the United States each year.[11]

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8. The studies described here were collected with the help of surveys of the literature published elsewhere. *See* Havlick, *supra* note 6, at 91-105 (citing studies); Conservation Biology Inst., *Importance of Bureau of Land Management Roadless Areas in the Western U.S.A.*, 35-37 (Mar. 2000) (same), *available at* http://www.consbio.org/cbi/pdf/blm/blm_report.pdf. Similar background information was in the record before the district court. *See, e.g.*, Expert Witness Report of Dr. Howard Wilshire at 4-6 (May 31, 2000).

9. *See* Robert H. Webb, *Compaction of Desert Soils by Off-Road Vehicles, in Environmental Effects of Off-Road Vehicles: Impacts and Management in Arid Regions* 51, 75-76 (Robert H. Webb and Howard G. Wilshire eds., 1983); Howard G. Wilshire, *The Impact of Vehicles on Desert Soil Stabilizers, in* Webb and Wilshire, *supra*, at 31, 45; Kristin H. Berry, *A Review of the Effects of Off-Road Vehicles on Birds and Other Vertebrates, in Management of Western Forests and Grasslands for Nongame Birds*, Forest Serv., U.S. Dep't of Agric., Forest Serv. Gen. Tech. Rep. INT-86 at 451, 459-60 (1980); R.E. Eckert *et al.*, *Impacts of Off-Road Vehicles on Infiltration and Sediment Production of Two Desert Soils*, 32 J. of Range Mgmt. 394, 394 (Sept. 1979); H. G. Wilshire and J. K. Nakata, *Off-Road Vehicle Effects on California's Mojave Desert*, 29 Cal. Geology 123, 129-31 (June 1976); Eric Davidson and Martha Fox, *Effects of Off-Road Motorcycle Activity On Mojave Desert Vegetation and Soil*, 22 Madroño 381, 388-89 (Oct. 1974).

10. *See* Jayne Belnap, *Recovery Rates of Cryptobiotic Crusts: Inoculant Use and Assessment Methods*, 53 Great Basin Naturalist 89, 93-94 (1993).

11. *See* Havlick, *supra* note 6, at 95 & n.44.

The soil damage caused by ORVs results in accelerated and excessive erosion.[12] In California's Mojave Desert, for example, ORVs have eroded hundreds of tons of soil and have led to major losses of animal and plant life; scientists believe the impacted desert areas will take hundreds of years to recover.[13] ORVs also impact vegetation directly by crushing and uprooting plants.[14] Data from the Mojave Desert showed an overall trend toward fewer plants and less coverage per shrub in ORV-disturbed areas than in undisturbed areas.[15] ORVs also significantly alter natural distributions of grass and forb cover leading to an overall reduction of plant diversity.[16]

The number, diversity, and biomass of vertebrates are also reduced by ORV use.[17] Birds are particularly susceptible to ORV disturbance, as the noise of ORVs interferes with nesting and mating. One study reported that even moderate ORV use caused a 50 percent reduction in the number of species of birds breeding in the Mojave Desert.[18] Sites in the Mojave Desert that were heavily used by ORVs also showed the lowest density and

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12. *See* Bern S. Hinkley *et al.*, *Accelerated Water Erosion in ORV-Use Areas*, *in* Webb and Wilshire, *supra* note 9, at 92-93.

13. *See* Wilshire and Nakata, *supra* note 9, at 130-31.

14. *See* Earl W. Lanthrop, *The Effect of Vehicle Use on Desert Vegetation*, *in* Webb and Wilshire, *supra* note 9, at 149, 157.

15. *See* Davidson and Fox, *supra* note 9, at 386.

16. *See* Christopher A. Clampitt, *Effects of Human Disturbances on Prairies and the Regional Endemic* Aster curtus *in Western Washington*, 67 Nw.-Sci. 163, 163 (1993).

17. *See* R. Bruce Bury, Roger A. Luckenbach, and Stephen D. Busack, *Effects of Off-Road Vehicles on Vertebrates in the California Desert*, 8 U.S. Fish and Wildlife Serv. Rep. at 1, 18-19 (1977).

18. *See* Roger A. Luckenbach, *An Analysis of Off-road Vehicle Use on Desert Avifaunas*, 43 Transactions of the N. Am. Wildlife Conf. 157, 158 (1978).

biomass of four species of lizard.[19] In the Imperial Dunes, ORV use caused a 20-fold reduction in the Colorado fringe-toed lizard.[20] Studies indicate that ORVs cause similar damage to frog and threatened tortoise populations, as well as to populations of small and large mammals.[21]

As ORVs have become more popular, BLM has come under increased pressure to allow ORVs to travel unimpeded on BLM lands. But BLM operates under a statutory and regulatory regime that mandates that certain lands with the potential to be designated as wilderness be shielded from degradation. As a result, BLM has a choice: it can either limit ORV use to prevent impairment of the wilderness potential of certain lands; or it can succumb to pressure from ORV users, fail to limit ORV use, and allow impairment to occur. The Respondents, Southern Utah Wilderness Alliance, *et al.* (collectively "SUWA"), merely argue that BLM has not fulfilled its non-discretionary, mandatory duty to do the former.

SUMMARY OF ARGUMENT

BLM received its first comprehensive mandate from Congress on how to manage the lands under its jurisdiction in FLPMA, which requires BLM to manage certain lands "so as not to impair the suitability of such areas for preservation as wilderness." 43 U.S.C. § 1782(c). To implement this mandate, BLM promulgated the Interim Management Policy and

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19. *See* Stephen D. Busack and R. Bruce Bury, *Some Effects of Off-Road Vehicles and Sheep Grazing on Lizard Populations in the Mojave Desert*, 6 Biological Conservation 179, 182 (July 1974). *See generally* Bayard H. Brattstrom and Michael C. Bandello, *Effects of Off-Road Vehicle Noise on Desert Vertebrates*, *in* Webb and Wilshire, *supra* note 9, at 167, 167-206.

20. *See* Berry, *supra* note 9, at 457.

21. *See* Matthew L. Brooks, *Benefits of Protective Fencing to Plant and Rodent Communities of the Western Mojave Desert, California*, 19 Envtl. Mgmt. 65, 65-66 (1995); Brattstrom and Bondello, *supra* note 19, at 202; Berry, *supra* note 9, at 457-58.

Guidelines for Land Under Wilderness Review ("IMP"), 44 Fed. Reg. 72,014 (Dec. 12, 1979). The IMP specifically requires BLM to restrict access or close roads to ORVs if ORV use threatens to impair the suitability of certain lands for preservation as wilderness. Beyond its mandates specifically related to wilderness, FLPMA requires that BLM manage all of its lands in accordance with land use plans that it develops with public participation. *See* 43 U.S.C. §§ 1712, 1732(a).

The Petitioners correctly point out that BLM has discretion in deciding exactly how its obligation to prevent impairment is fulfilled, and that the agency has taken some action. But such discretion and any actions taken do not relieve BLM of the absolute obligation to prevent the impairment prohibited by FLPMA. If impairment is occurring in potential wilderness areas, a court may compel BLM to fulfill its duties under Section 706(1) of the APA, 5 U.S.C. § 706(1), including by limiting ORV use as required by the IMP.

BLM also is subject to NEPA, which requires that federal agencies be aware of and consider the effects of their actions upon the environment. In particular, NEPA requires agencies to take a "hard look" at new circumstances or information that arise in the course of undertaking an action, and that might bear on the environmental effects of that action. *See Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 373-74 (1989); 40 C.F.R. 1502.9(c). SUWA argues that BLM failed to take a "hard look" at important evidence of increased ORV use on certain parcels of land. The "hard look" that SUWA seeks to compel under Section 706(1) of the APA is a mandatory, non-discretionary duty that is judicially enforceable.

ARGUMENT

I. The APA Provides Federal Courts With Subject Matter Jurisdiction Over Respondents' FLPMA Claims

A. FLPMA Obligates BLM To Administer Certain Lands "So As Not To Impair The Suitability Of Such Areas For Preservation As Wilderness"

A decades-long effort to systematize BLM's management of public land culminated in 1976 with the enactment of FLPMA,[22] which instructed BLM to manage its lands "on the basis of multiple use and sustained yield," 43 U.S.C. § 1701(a)(7), and in a manner:

> that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values; that, where appropriate, will preserve and protect certain public lands in their natural condition; that will provide food and habitat for fish and wildlife and domestic animals; and that will provide for outdoor recreation and human occupancy and use. . . .

id. § 1701(a)(8). To this end, FLPMA instructed the Secretary of the Interior to "prepare and maintain on a continuing basis an inventory of all [BLM] lands and their resource and other values," 43 U.S.C. § 1711(a), to develop "land use plans which provide by tracts or areas for the use of the public lands," *id.* § 1712(a), and to manage BLM lands "in accordance with the land use plans." *Id.* at § 1732(a).

In addition to this general scheme, FLPMA has the specific goal of providing for the inclusion of qualified BLM lands in the National Wilderness Preservation System, which

22. *See generally* D. Michael Harvey, *Exempt from Public Haunt: The Wilderness Study Provisions of the Federal Land Policy and Management Act*, 16 Idaho L. Rev. 481, 481-99 (1980) (discussing legislative history and purpose of wilderness provisions of FLPMA).

Congress created in 1964 when it enacted the Wilderness Act, 16 U.S.C. § 1131 *et seq*. *See* 43 U.S.C. §§ 1701(a)(8), 1782.[23] In establishing the National Wilderness Preservation System, Congress pronounced:

> In order to assure that an increasing population, accompanied by expanding settlement and growing mechanization, does not occupy and modify all areas within the United States and its possessions, leaving no lands designated for preservation and protection in their natural condition, it is hereby declared to be the policy of the Congress to secure for the American people of present and future generations the benefits of an enduring resource of wilderness. For this purpose there is hereby established a National Wilderness Preservation System to be composed of federally owned areas designated by Congress as "wilderness areas". . . .

16 U.S.C. § 1131(a). Congress next defined the essential characteristics of the "wilderness" to be protected:

> A wilderness, in contrast with those areas where man and his own works dominate the landscape, is hereby recognized as an area where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain. An area of wilderness is further defined to mean in this chapter an area of underdeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habitation, which is protected and managed so as to preserve its natural conditions and which (1) generally appears to have been affected primarily

23. The Report of the House Committee on Interior and Insular Affairs recommended passage of FLPMA due in part to an "[u]rgent need for Congressional direction" with regards to "inclusion of BLM lands in the Wilderness System." H.R. Rep. No 94-1163 at 3 (1976).

> by the forces of nature, with the imprint of man's work substantially unnoticeable; (2) has outstanding opportunities for solitude or a primitive and unconfined type of recreation; (3) has at least five thousand acres of land or is of sufficient size as to make practicable its preservation and use in an unimpaired condition; and (4) may also contain ecological, geological, or other features of scientific, educational, scenic, or historical value.

16 U.S.C. § 1131(c).

Congress's purpose in protecting wilderness was to preserve something of immeasurable value, which, if lost, could never be retrieved.[24] In an oft-cited letter that in 1960 was sent to legislators working on the Wilderness Act, the novelist and conservationist Wallace Stegner wrote:

> Something will have gone out of us as a people if we ever let the remaining wilderness be destroyed . . . so that never again will Americans be free in their own country from the noise, the exhausts, the stinks of human and automotive waste. And so that never again can we have the chance to see ourselves single, separate, vertical and individual in the world, part of the environment of trees and rocks and soil, brother to the other animals, part of the natural world and competent to belong in it. . . . We need wilderness preserved—as much of it as is still left, and as many kinds—because it was the challenge against which our character as a people was formed. The reminder and the reassurance that it is still there

24. As a former Director of BLM simply stated on the thirty-fifth anniversary of the passage of the Wilderness Act, "Wilderness is a resource which can shrink but not grow." Patrick A. Shea, *Foreword: Symposium: Wilderness Act of 1964: Reflections, Applications, and Predictions*, 76 Denv. U. L. Rev. 331, 331 (1999) (quotation and citation omitted).

> is good for our spiritual health even if we never once in ten years set foot in it. It is good for us when we are young, because of the incomparable sanity it can bring briefly, as vacation and rest, into our insane lives. It is important to us when we are old simply because it is there—important, that is, simply as an idea.

Wallace Stegner, *Wilderness Letter*, *in The Sound of Mountain Water* 145, 146-47 (1997), *available at* http://www.wilderness.org/OurIssues/Wilderness/wildernessletter.cfm.[25]

To achieve its goal of including BLM lands in the National Wilderness Preservation System, Congress instructed the Secretary of the Interior, as part of the ongoing inventory of BLM lands, 43 U.S.C. § 1711(a), to create a list of those lands that might be designated as wilderness areas, *i.e.*, roadless areas

25. Economists have noted "that areas with intact natural environments, protected by official wilderness or park status, have attracted higher levels of economic activity than otherwise comparable areas without intact natural environments." Thomas Michael Power, *"Gifts of Nature" in an Economic World*, *in Return of the Wild: The Future of Our Natural Lands* 55, 56 (Ted Kerasote, ed. 2001) (citing studies). "In other words, counties with higher percentages of wilderness have faster total income, employment, per capita income and population growth rates than counties without wilderness." Paul A. Lorah, *Population Growth, Economic Security, and Cultural Change in Wilderness Counties*, *in Wilderness Science in a Time of Change Conference*, U.S. Dep't of Agric., Forest Serv. No. RMRS-P-15-VOL-2 at 230, 232 (May 1999). In December of 2003, more than one hundred economists signed a letter to the President noting that the loss of roadless public lands "undermines one of the cornerstones of economic strength for communities throughout the West." *A Letter from Economists to President Bush and the Governors of Eleven Western States Regarding the Economic Importance of the West's Natural Environment*, at 4 (Dec. 3, 2003), *available at* http://www.econw.com/pdf/120303letter.pdf. As a notable columnist observed, despite their economic value, "[s]ome assets, such as wilderness areas, cannot survive if unprotected from the morals of the martketplace." George F. Will, *A Word for the Wilderness*, Newsweek, Aug. 19 1982, at 68.

five thousand acres in size or larger that contain wilderness characteristics. *Id.* at § 1782(a). Having completed the initial list, the Secretary was to make recommendations to the President as to which areas were suitable for preservation as wilderness, *id.*, and the President was in turn to make such recommendations to Congress. *Id.* at § 1782(b). Congress would then have the final say as to which areas would be designated as wilderness and thus included in the National Wilderness Preservation System. *Id.* at §§ 1782(b) & (c).

Congress anticipated that a substantial period of time would elapse between the enactment of FLPMA and its ultimate decision on whether to designate a particular area for preservation under the Wilderness Act.[26] In order that its own options not be foreclosed by the press of development and that potential wilderness areas not be lost before it could make its wilderness designations, Congress instructed BLM to maintain the status quo in potential wilderness areas:

> During the period of review of such areas and until Congress has determined otherwise, *the Secretary shall continue to manage such lands* according to his authority under this Act and other applicable law

26. Congress was prescient on this point. In 1980, BLM identified 2.5 million acres of land in Utah as suitable for preservation as wilderness, including the areas at issue in this case. *See* 45 Fed. Reg. 75,602, 75,603 (designating Moquith Mountain, Parunuweap Canyon, Sid's Mountain, and Behind the Rocks as wilderness study areas). BLM has since identified additional lands as suitable, and the Secretary of the Interior and the President have both forwarded their recommendations to Congress. As of the end of 2003, Congress had acted as to some 27,700 acres of land, but had left the ultimate status of more than 3.3 million acres of land in Utah undecided. *See* U.S. Dep't of Interior, Bureau of Land Mgmt., *Utah Wilderness Questions & Answers*, *available at* www.ut.blm.gov/utahwilderness/q&as.htm. *See generally*, H. Michael Anderson & Aliki Moncrief, *America's Unprotected Wilderness*, 76 Denv. U. L. Rev. 413, 425-31 (1999) (discussing history of wilderness designation in Utah).

> *in a manner so as not to impair the suitability of such areas for preservation as wilderness . . . .*

43 U.S.C. § 1782(c) (emphasis added). At present, BLM is charged with preserving more than six hundred potential wilderness areas totaling more than 16 million acres of land in accordance with this mandate. *See* U.S. Dep't of Interior, Bureau of Land Mgmt., No. BLM/BC/ST-03/001+1165, *Public Land Statistics 2002*, at 232 (Apr. 2003).

To guide its actions and those of reviewing courts, BLM has promulgated guidelines interpreting FLPMA's mandate that wilderness suitability not be impaired—the IMP. *See* 44 Fed. Reg. 72,014, 72,014-16.[27] Where FLPMA is ambiguous, courts defer to BLM's interpretation of the statute, as articulated in the IMP. *See, e.g., Sierra Club v. Clark*, 774 F.2d 1406, 1408-09 (10th Cir. 1985) (deferring to IMP); *see also Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837, 843-44 (1984).

1. The IMP Requires BLM To Take Final Agency Action To Prevent Impairment And Fulfill Its Obligations Under FLPMA

The IMP is BLM's interpretation of what the "nonimpairment mandate" requires for two categories of land: first, lands for which BLM has not completed the wilderness inventory process that is required by FLPMA; and second, Wilderness Study Areas (or "WSAs"), which are lands that BLM has determined to have wilderness characteristics, but that Congress has not yet decided to designate as wilderness. 44 Fed. Reg. 72,104; *cf.* Revised IMP, Introduction.

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27. BLM promulgated the IMP through notice and comment procedures. *See Rocky Mountain Oil & Gas Ass'n v. Watt*, 696 F.2d 734, 739 n.6 (10th Cir. 1982). As Petitioners point out, the BLM has revised the IMP over time as it has gained more information on the impacts of ORV use. *See* Pet. Br. at 3; U.S. Dep't of Interior, Bureau of Land Mgmt., No. H-8550-1, *Interim Management Policy For Lands Under Wilderness Review* (1995) ("Revised IMP"), *available at* http://www.ut.blm.gov/utahwilderness/imp/imp.htm.

Except for certain "grandfathered" mineral extraction and grazing activities, BLM has declared that an activity on a WSA is in accord with Congress's nonimpairment mandate only "if BLM determines that it meets each of the following criteria, which are referred to as the 'nonimpairment criteria'": (a) the activity must be temporary; (b) any impact caused by the activity must "be capable of being reclaimed to a condition of being substantially unnoticeable in the wilderness study area (or inventory unit) as a whole"; and (c) when the activity and reclamation are over, "the area's wilderness values must not have been degraded so far" as to constrain the Secretary's ability to recommend the area for preservation as wilderness. 44 Fed. Reg. 72,022; *cf.* Revised IMP at I.B.2.

Certain activities "that protect or enhance the land's wilderness values or that provide the minimum necessary facilities for public enjoyment of the wilderness values are considered nonimpairing. For example, trails and sanitary facilities could be built for primitive recreational use." 44 Fed. Reg. 72,018; *cf.* Revised IMP at I.B.4. But the IMP is skeptical about whether even seemingly nondisruptive activity in wilderness lands can meet the nonimpairment criteria:

> It is recognized that many minor impacts of nonimpairing activities could accumulate to a point at which the total impact would impair wilderness suitability either by creating impacts that overall are *noticeable* (i.e. are not substantially unnoticeable) or by degrading the area's wilderness values so far, compared with the area's values for other purposes, as to significantly constrain the Secretary's recommendation with respect to the area's suitability or nonsuitability for preservation as wilderness.

44 Fed. Reg. 72,019 (emphasis in original); *cf.* Revised IMP at I.B.5.

The IMP expresses particular concern about the "erosion caused by increased off-road vehicle travel on trails." 44 Fed.

Reg. at 72,024. As to ORV use *off* trails, the Revised IMP states: "Cross-Country vehicle use off boundary roads and existing ways is surface disturbing" and "must be denied." Revised IMP at I.B.3.[28] In other words, BLM must either prevent off-road ORV use from occurring, or risk violating FLPMA. Revised IMP at I.B.2.

The BLM is required to take the following actions if impairment is occurring:

> To prevent such cumulative impacts from impairing wilderness suitability, the BLM will monitor the cumulative impacts of ongoing activities. If those impacts are growing so great that the area's wilderness suitability could be impaired, the BLM will take steps to control that impact by adjusting the conditions of use (such as time, place, and quantity), by prohibiting the expansion of the activity, or, if necessary, by prohibiting the activity altogether on the affected lands.

44 Fed. Reg. 72,019; *cf.* Revised IMP at I.B.5. Thus, if ORV impacts in a WSA "are growing so great that the area's wilderness suitability could be impaired," then BLM must either (i) adjust the "time, place, and quantity" of ORV use, (ii) prohibit the "expansion" of ORV use, or (iii) prohibit ORV use "altogether on the affected lands."

As the District Court found below, SUWA has presented colorable evidence that ORV use is impairing the specific WSAs at issue here. *See S. Utah Wilderness Alliance v. Babbitt*, 2000 WL 33914094 at *5 (D. Utah, Dec. 22, 2000) (SUWA

28. The IMP notes that while "[t]he use of motor vehicles and motorized equipment does not necessarily impair wilderness suitability," 44 Fed. Reg. at 72,020, ORVs may be used off of existing routes only in emergencies or where that use satisfies the nonimpairment criteria. *Id.* at 72,019-21. "Based on past practice, it is expected that ORV events involving cross-country travel (off existing ways and trails) as part of the route would rarely satisfy the nonimpairment criteria." *Id.* at 72,024.

"presented significant evidence about the alleged impairment that is occurring in the WSAs due to ORV use"). If impairment is occurring, then, under the mandates of FLPMA, BLM *must do whatever is necessary* to prevent impairment, including restricting or closing areas to ORV use. *See* 44 Fed. Reg. 72,023 ("BLM will take all actions necessary to ensure full compliance with the Interim Management Policy."); *cf.* Revised IMP at II.E.

B. BLM's Failure To Fulfill Its Duties Under FLPMA And The IMP Constitutes Agency Inaction Subject To Review Under Section 706(1)

Proceeding under the APA, SUWA argues that BLM has failed to prevent ORV use from impairing the suitability of four specific WSAs for inclusion in the National Wilderness Preservation System.[29] Specifically, SUWA argues: under FLPMA, BLM has a mandatory, non-discretionary duty to prevent ORV use from impairing the suitability of these four WSAs for designation as wilderness; because ORV use is impairing the wilderness suitability of these four WSAs, BLM is obliged to act; and BLM has failed to act to prevent such impairment. These allegations suffice to establish subject matter jurisdiction under Section 706(1) of the APA.

1. FLPMA And The IMP Identify Mandatory, Non-Discretionary Duties That BLM Must Perform

Petitioners' first argument for reversal is that FLPMA "does not specify what would constitute 'impairment'" and does not "identify any discrete final agency action that BLM is required to take in its management of wilderness study areas." Pet. Br. at 36. It is not clear why these two objections are relevant. Judicial interpretation of FLPMA is not foreclosed by omission in the statutory language of "what would constitute 'impairment.'" *See Chevron*, 467 U.S. at 843 & n.9 ("The judiciary is the final

29. *See* Tenth Cir. Response Br. for Appellees Gale Norton and Bureau of Land Mgmt. at 13; Tenth Cir. Opening Br. for Appellants SUWA, *et al.* at 11.

authority on issues of statutory construction," including when a statute is "silent or ambiguous"). Also, FLPMA is not rendered ineffectual by its failure to identify what Petitioners deem to be "discrete final agency action." The language giving rise to SUWA's claim under Section 706(1) could not be clearer—BLM's non-impairment duty is mandatory and non-discretionary.

Moreover, as shown above, BLM's own interpretation of FLPMA in the form of the IMP not only defines impairment, but also identifies specific final agency action that BLM is required to take to prevent impairment from occurring. Regardless of Petitioners' attempt to ignore the IMP in its brief, BLM must abide by its own interpretation of FLPMA. *See, e.g.*, *Vitarelli v. Seaton*, 359 U.S. 535, 545 (1959). Section 706(1) provides jurisdiction for SUWA's claims that BLM has failed to meet FLPMA's mandatory, non-discretionary duty of nonimpairment, and to take the steps (that its own IMP deems) necessary to prevent the impairment (that its own IMP deems as) resulting from ORVs.

2. SUWA Seeks To Compel Final Agency Action

Petitioners next argue that dismissal is appropriate because Section 706(1) is only available to compel final agency actions. Pet. Br. at 37-39. Petitioners misconstrue Section 706(1).[30] But even if not, Petitioners' argument fails because the duties SUWA seeks to compel under 706(1) would require the taking of final agency action by BLM.

For example, the district court could simply issue an order for BLM to take final action consistent with the IMP to prevent impairment in a specific WSA. Petitioners concede that such an order would be appropriate under Section 706(1), *see* Pet. Br. at 12, and, given the terms of the IMP and a record demonstrating impairment, such an order would oblige BLM

30. To avoid repetition, *Amici* hereby adopt by reference Respondent SUWA's argument that Section 706(1) is available to compel administrative action that would not be "final" under Section 706(2).

to issue road restrictions and/or closures, which Petitioners concede would constitute final agency action. *See* Pet. Br. at 55. Alternatively, the district court, pursuant to the IMP and a record demonstrating impairment, could issue an order requiring BLM to decide in a formal document whether to restrict or close certain areas to ORV use. Petitioners concede that such an order would result in final agency action, and would provide at least part of the relief sought by SUWA. *See id.*

3. The Discretion Provided By FLPMA Does Not Deny A Court Jurisdiction To Compel BLM To Comply With FLPMA's Mandatory, Non-Discretionary Duties

Petitioners argue that, because BLM has some discretion in deciding how to implement FLPMA, Section 706(1) is not available to compel BLM to fulfill its mandatory, non-discretionary duties under the statute. Pet. Br. at 39-41.[31] Petitioners misstate the role that any discretion BLM has under FLPMA should play in a court's review of BLM's action or inaction. While BLM may have discretion in deciding *how* to fulfill the nonimpairment mandate, the agency does not have discretion in deciding *whether* to fulfill that mandate. And it is only the second of these issues—*whether* BLM has prevented wilderness impairment—that is at issue in determining if BLM has "unlawfully withheld or unreasonably delayed" action for the purposes of Section 706(1). If wilderness impairment has occurred, then, *ipso facto*, BLM has unlawfully withheld or unreasonably delayed some action it should have been taking.

31. To support this argument, Petitioners characterize SUWA as seeking to compel "programmatic" relief. Pet. Br. at 39. No matter how often Petitioners repeat "programmatic" in their brief, it does not change the fact that the claims at issue here concern four specific WSAs. Such a challenge to specified parcels is exactly the type of challenge permitted by the APA. *See, e.g.*, *Sierra Club v. Peterson*, 228 F.3d 559, 567-68 (5th Cir. 2000). Petitioners also argue that Section 706(1) is limited to actions in the nature of *mandamus*. Pet. Br. at 39. To avoid repetition, *Amici* adopt SUWA's argument refuting this point.

Any discretion BLM has in deciding how to prevent impairment is relevant only when the court decides what remedy to order—which would be *after* the Court has determined that BLM violated FLPMA by allowing impairment, and *after* the Court has found jurisdiction under Section 706(1).

None of this should come as any surprise to Petitioners, since no statute can possibly spell out exactly what an agency is to do in every situation. Accordingly, courts are well versed in such matters, giving appropriate deference on the merits to an agency's own interpretations of a statute. *See Chevron*, 467 U.S. at 843-44 & n.9; *Norton*, 301 F.3d at 1227-28 ("[W]e must give considerable deference to [BLM's] interpretation of the nonimpairment mandate"; however, such deference does not "immunize the BLM from its clear, nondiscretionary duty" to prevent impairment (citations omitted)).

4. BLM Is Not Immune From Judicial Review Because It Has Taken "Some" Action

Petitioners concede that jurisdiction would be appropriate under Section 706(1) if BLM had taken *no* action to fulfill its duties under FLPMA and the IMP. However, Petitioners contend that because BLM has taken *some* action toward preventing impairment, SUWA may not rely on Section 706(1) to establish jurisdiction. Pet. Br. at 39, 41.[32] This argument misconstrues the law, and would eviscerate the purpose of FLPMA.[33] FLPMA,

32. Petitioners state that "[n]either SUWA nor the court of appeals disputed that BLM is, in fact, taking measures to prevent impairment." Pet. Br. at 39. Regardless of whether this is true, it is also undisputed that Respondents have presented colorable evidence showing that impairment is occurring. *See Babbitt*, 2000 WL 33914094 at *5 (SUWA "presented significant evidence about the alleged impairment that is occurring in the WSAs due to ORV use").

33. The general rule Petitioners urge the Court to adopt has previously been rejected as untenable. *See Ctr. for Biological Diversity v. Veneman*, 335 F.3d 849, 856-57 (9th Cir. 2003); *Montana Wilderness Ass'n v. United States Forest Serv.*, 314 F.3d 1146, 1151 (9th Cir. 2003).

by its plain terms, requires BLM to *prevent* impairment, not to take some action no matter how trivial or ineffectual. 43 U.S.C. § 1782(c). Moreover, the IMP obliges BLM to restrict or close areas to ORVs if they threaten to impair the wilderness suitability of WSAs. In short, if impairment is occurring, BLM's actions to date are largely, if not entirely, irrelevant.

C. BLM's Failure To Fulfill Its Duties Under The Land Use Plans Constitutes Agency Inaction Subject To Review Under Section 706(1)

SUWA also argues that BLM has failed to carry out its duties under two land use plans.[34] By the plain terms of FLPMA and the regulations that implement it, these land use plans create obligations that BLM is obliged to fulfill. *See* 43 U.S.C. § 1732(a) ("The Secretary *shall* manage the public lands . . . in accordance with the land use plans") (emphasis added); *see also* 43 C.F.R. 1610.5-3(a). Moreover, as established above, the relief SUWA seeks would be in the form of an order compelling final agency action. *See Norton*, 301 F.3d at 1233-34 & n.15. Thus, according to Petitioners' own terms, jurisdiction under Section 706(1) is appropriate.

D. The Judgment Of The Tenth Circuit Should Be Affirmed

FLPMA's non-impairment standard is mandatory and non-discretionary; BLM may not choose to allow impairment of WSAs. Nor may BLM choose to violate its land use plans. The Tenth Circuit properly held that the district court has jurisdiction under Section 706(1) to compel BLM to perform its mandatory, non-discretionary duties, including as set out in BLM's own IMP and land use plans.

34. *See* Tenth Cir. Response Br. for Appellees Gale Norton and Bureau of Land Mgmt. at 44-45; Tenth Cir. Opening Br. for Appellants SUWA *et al.* at 15-18.

II. The APA Provides Federal Courts With Subject Matter Jurisdiction Over Respondents' NEPA Claims

A. NEPA Imposes Mandatory, Non-Discretionary Duties On BLM

As articulated by Congress, the purpose of NEPA is: "To declare a national policy which will encourage productive and enjoyable harmony between man and his environment" and "promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man." 42 U.S.C. § 4321. Congress sought to achieve these substantive goals through procedural means; thus, NEPA created procedural mechanisms to ensure that before reaching a decision, a federal agency "will have available, and will carefully consider, detailed information concerning significant environmental impacts." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). "Simply by focusing the agency's attention on the environmental consequences of a proposed project, NEPA ensures that important effects will not be overlooked or underestimated. . . ." *Id.*

NEPA contains certain "action forcing" provisions, which are directives to "all agencies to assure consideration of the environmental impact of their actions in decisionmaking." *Kleppe v. Sierra Club*, 427 U.S. 390, 409 & n.18 (1976) (citation and quotation omitted). Most pertinent here is Section 102(C)(2) of NEPA, which requires agencies to include in every "recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment" a "detailed statement" on "the environmental impact of the proposed action." 42 U.S.C. § 4332(2)(C).

CEQ, which was created by NEPA, 42 U.S.C. § 4342,[35] has issued regulations governing when and how such

35. After passage of NEPA, President Nixon specifically charged CEQ with promulgating regulations for NEPA's "action forcing" provisions. *See* Exec. Order No. 11514 §3(h), 40 C.F.R. pt. 1500, *reprinted in* 42 U.S.C. § 4321.

environmental impact statements ("EISs") are to be issued. *See* 40 C.F.R. 1501 *et seq*. Except for certain classes of actions and those instances in which the decision to prepare an EIS already has been made, an agency's compliance with Section 102(C)(2) of NEPA begins with an Environmental Assessment, or "EA." 40 C.F.R. 1501.3, 1501.4. An EA is a concise document providing evidence and analysis relating to the environmental impacts of the agency's proposed action. 40 C.F.R. 1508.9. If the agency concludes, based on its EA, that the proposed action will not have a "significant effect on the human environment," then the agency issues a document called a Finding Of No Significant Impact, or "FONSI," which briefly presents the reasons for its decision. 40 C.F.R. 1508.13. Alternatively, if the agency concludes that the proposed action will have a significant impact, it must prepare an EIS. 40 C.F.R. 1501.4.

The purpose of an EIS is "to insure that the policies and goals defined in [NEPA] are infused into the ongoing programs and actions of the Federal government." 40 C.F.R. 1502.1. Thus, CEQ has provided extensive instructions to agencies regarding the timing, contents, and structure of an EIS. *See* 40 C.F.R. 1502. Moreover, the issuance of an EIS or EA does not mark the end of the procedural duties that NEPA imposes on an agency. CEQ regulations require that "[a]gencies shall prepare supplements to either draft or final environmental impact statements if . . . [t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. 1502.9(c).

This Court discussed the standards governing the issuance of a Supplemental Environmental Impact Statement ("SEIS") in *Marsh*, 490 U.S. 374.[36] In *Marsh*, the Court held that "[i]f there remains major Federal action to occur, and the new information is sufficient to show that the remaining action will affect the quality of the human environment in a significant

36. Petitioners do not dispute that the standards governing the issuance of a supplemental EA are identical to those governing the issuance of a SEIS.

manner or to a significant extent not already considered, a supplemental EIS must be prepared." *Id.* at 374 (citations and quotations omitted). The Courts of Appeals, including the Tenth Circuit, *Norton*, 301 F.3d at 1238, have interpreted *Marsh* as requiring that:

> In reviewing an agency's decision not to prepare a supplemental EIS, a court must undertake a two-step inquiry. First, the court must determine whether the agency took a hard look at the proffered new information. Second, if the agency did take a hard look, the court must determine whether the agency's decision not to prepare a supplemental EIS was arbitrary and capricious.

Hughes River Watershed Conservancy v. Glickman, 81 F.3d 437, 443 (4th Cir. 1996) (citing, *inter alia*, *Marsh*, 490 U.S. at 385); *see also Village of Grand View v. Skinner*, 947 F.2d 651, 657 (2d Cir. 1991). *But cf. S. Trenton Residents Against 29 v. Fed. Highway Admin.*, 176 F.3d 658, 663 (3d Cir. 1999) (articulating three-part test consistent with the above).

B. BLM's Failure To Fulfill Its Duties Under NEPA Constitutes Agency Inaction Subject To Review Under Section 706(1)

SUWA's claims under NEPA arise from five EISs and EAs that were issued by BLM, and that study the impacts of ORV use on lands under BLM's management.[37] SUWA alleges that, in the years since these NEPA documents were issued, ORV use has increased dramatically on the lands studied. SUWA argues that BLM has failed to fulfill its mandatory, non-discretionary duty to take a "hard look" at this increased ORV use to determine whether it constitutes "significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts,"

37. *See Norton*, 301 F.3d at 1237 & n.18; *Babbitt*, 2000 WL 33914094 at *8; Tenth Cir. Opening Br. for Appellants SUWA *et al.* at 22-24.

40 C.F.R. 1502.9(c), such that the issuance of supplemental NEPA documents would be required. The District Court, misconstruing SUWA's request for an order compelling a "hard look" to be a request for an order compelling completion of a SEIS, dismissed SUWA's claim. *See Babbitt*, 2000 WL 33914094 at *9. The Tenth Circuit reversed, recognizing that under the circumstances present, the district court could order BLM to take the "hard look" required by NEPA. *See Norton*, 301 F.3d at 1236-40.

Petitioners' argument for reversal of the judgment of the Tenth Circuit is narrow. Petitioners do not dispute that the information regarding ORV use contained in BLM's EAs and EISs is outdated, or that evidence of increased ORV usage constitutes "significant new circumstances or information relevant to environmental concerns." Nor, indeed, could Petitioners make such an argument, since BLM concedes that it never took a "hard look" at this new evidence.[38] Instead, Petitioners argue only that BLM's refusal to take the requisite "hard look" is immune from judicial review.

Petitioners proffer two bases for their proposed rule of law. First, paralleling their FLPMA argument, Petitioners argue that jurisdiction is improper under Section 706(1) of the APA because the "hard look" that SUWA seeks to compel would not constitute "final agency action." Second, Petitioners argue that, because BLM is not currently proposing any new "major federal action" on which evidence of increased ORV use might bear, BLM is relieved of any duties under 40 C.F.R. 1502.9(c). Petitioners cannot so easily defeat the purpose of NEPA.

38. BLM admitted to the district court that, "[u]p to this point, the agency has not made any formal determination as to whether . . . the preparation of a supplemental EIS or EA" is required. *See* Appendix to Tenth Cir. Opening Br. for Appellants SUWA *et al.* at 745.

1. BLM's Failure To Take A "Hard Look" Is Reviewable Under Section 706(1) As "Action Unlawfully Withheld Or Unreasonably Delayed"

The APA grants courts jurisdiction to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). SUWA argues that BLM has "unlawfully withheld or unreasonably delayed" taking a "hard look" at evidence of increased ORV use. Petitioners counter by arguing that taking a "hard look" is not "final agency action," and therefore is beyond judicial review under Section 706(1).

Petitioners' argument that a court may not order a "hard look" is contrary to the plain language of the APA. The APA provides that: (i) courts "shall . . . compel agency action unlawfully withheld or unreasonably delayed," 5 U.S.C. § 706(1); (ii) "agency action" "includes the whole or part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act," 5 U.S.C. § 551(13), 701(b)(2); and (iii) "relief" "includes the whole or a part of an agency . . . taking of other action on the application or petition of, and beneficial to, a person." 5 U.S.C. § 551(11)(C). An order compelling BLM to take a "hard look" would meet all three elements, as it would be an order to (i) "compel agency action," where the "agency action" at issue was (ii) "relief" sought (iii) "on the application or petition of" SUWA. Thus, the District Court may provide the relief that SUWA seeks by compelling BLM to take the "hard look" that has been "unlawfully withheld or unreasonably delayed." *Cf. Sierra Club v. Glickman*, 156 F.3d 606, 612, 617-18 & n.7 (5th Cir. 1998) (finding Section 706(1) an appropriate means to compel USDA to consult with the Fish and Wildlife Service, a procedural requirement of the Endangered Species Act).[39]

39. Moreover, as Petitioners recognize, Section 706(1) provides courts with the ability to compel an agency to respond to a rule-making petition, or to make a determination on an administrative complaint, or

(Cont'd)

This Court's decision in *Bennett v. Spear*, 520 U.S. 154 (1997), on which Petitioners heavily rely, is not to the contrary. *Bennett* established the following test for assessing whether an agency action is "final" under the APA:

> As a general matter, two conditions must be satisfied for agency action to be 'final': First, the action must mark the 'consummation' of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences flow.'

520 U.S. at 177-78.

The *Bennett* test was not applied in the context of agency inaction, nor did *Bennett* hold that an agency action must be "final" for purposes of Section 706(2) in order to be properly compelled under Section 706(1). But even if the only actions that could be compelled under Section 706(1) were actions that were "final" under *Bennett*, a "hard look" would pass muster. First, taking a "hard look" is far from tentative or interlocutory. Once an agency has taken a "hard look" at evidence, it has enough information to evaluate the significance of that evidence; until the agency has taken a "hard look," it does not. The act of taking a "hard look" shifts the agency's focus onto, and advances the agency's knowledge of, environmental issues in an irreversible way, which is the "culmination" that NEPA seeks. Second, legal consequences flow from a "hard look," because a "hard look" subjects BLM

(Cont'd)

to act on a permit application. Pet. Br. at 20. None of these orders may be distinguished in any principled way from an order compelling an agency to take a "hard look." Rather, an order to compel BLM to take a hard look merely compels the agency to exercise its discretion without directing the outcome—which Petitioners concede Section 706(1) allows. Pet. Br. at 21.

to the legal obligation to make a non-arbitrary, non-capricious decision about whether or not to issue a SEIS.[40]

Finally, the decision whether to issue a SEIS—*i.e.*, taking a "hard look"—is no mere procedural triviality. The purpose of NEPA is to ensure that important environmental effects "will not be overlooked or underestimated," and to do so by "focusing the agency's attention" on "environmental consequences." *Methow*, 490 U.S. at 349. Judicial review pursuant to Section 706(1) ensures that an agency fulfills this mandatory, non-discretionary duty of NEPA, and understands the environmental impacts of its actions.

2. BLM's Failure To Take A "Hard Look" Is Not Excused By An Alleged Absence Of New "Major Federal Action"

Petitioners also are in error when they assert that there is no "major federal action" here that triggers the requirements of 40 C.F.R. 1502.9(c).[41] It is precisely because BLM's actions

40. It is well-established that federal courts "should apply the finality requirement in a 'flexible' and 'pragmatic' way." *Telecomms. Research and Action Ctr. (TRAC) v. FCC*, 750 F.2d 70, 75 n.27 (D.C. Cir. 1984) (citing *Abbott Labs. v. Gardner*, 387 U.S. 136, 149-50 (1967)). Accordingly, in the context of agencies administering ongoing plans such as the plans BLM administers here, courts have found that the failure to consider or issue a SEIS is final agency action. *See, e.g., Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 555, 559 (9th Cir. 2000) (holding "that the Forest Service's failure to evaluate in a timely manner the need to supplement the original EIS in light of that new information violated NEPA"); *Portland Audubon Soc'y v. Lujan*, 795 F.Supp. 1489, 1504-05 (D. Or. 1992) (holding that BLM's failure to prepare SEIS was final action) *aff'd sub nom. Portland Audubon Soc'y v. Babbitt*, 998 F.2d 705, 708 (9th Cir. 1993) (affirming this holding explicitly); *see also Wisconsin v. Weinberger*, 745 F.2d 412, 417-24 (7th Cir. 1984) (reviewing, as final agency action, Navy's decision not to issue a SEIS to address new information regarding the environmental effect of an ongoing submarine project).

41. Petitioners note that "[n]either SUWA's NEPA claim nor the court of appeals' ruling allowing that claim to go forward rests on the (Cont'd)

under the land use plans are ongoing that the agency is obliged to consider new information that may render its prior environmental studies obsolete. Indeed, this Court reached the same conclusion in *Marsh*, where changing circumstances during ongoing construction of a dam required the Army Corps of Engineers to take a "hard look." 490 U.S. at 363, 373-74.

Moreover, even accepting *arguendo* Petitioners' flawed contention that ongoing actions under a land use plan do not constitute "major Federal action," the CEQ regulations that define "major Federal action" define it to include failures to act that are reviewable under the APA, such as BLM's admitted failure to take a "hard look" here:

> Major federal action includes actions with effects that may be major and which are potentially subject to Federal control and responsibility. Major reinforces but does not have a meaning independent of significantly.[42] *Actions include the circumstances where the responsible officials fail to act and that failure to act is reviewable by courts . . . under the Administrative Procedure Act . . . as agency action.*

40 C.F.R. 1508.18. Thus, since BLM's failure to take a "hard look" is reviewable under the APA (as shown above), that same failure constitutes a "major federal action" under NEPA.[43]

(Cont'd)
premise that BLM was proposing any 'major Federal action' for those lands." Pet. Br. 45. Petitioners, however, fail to mention that the reason for this is that BLM did not argue Petitioners' new theory of no "major federal action" to the Tenth Circuit until its petition for rehearing en banc.

42. This sentence refers to the language in NEPA providing that agencies shall include an impact statement in "every recommendation and report on proposals for legislation and *other major federal action significantly affecting the quality of the human environment.*" 42 U.S.C. § 4332(2)(C) (emphasis added).

43. If nothing else, the actions remaining to be taken over the indefinite life of the land use plans constitute "major federal actions significantly affecting the quality of the human environment" sufficient to implicate 42 U.S.C. § 4332(2)(C).

Most importantly, Petitioners' argument is fatally flawed because it violates the spirit of NEPA. Under Petitioners' view, no "major federal action" remains when an agency (such as the BLM) administers a plan (such as the land use plans here) for a potentially indefinite period of time. Thus, under Petitioners' view, even if significant new evidence arises that an agency's ongoing management is based on faulty information, a court cannot review—under *Marsh* or any other standard—the agency's refusal to take a "hard look" at the new information. Congress and CEQ could not have intended a result so contrary to the objectives of NEPA.[44]

C. The Judgment Of The Tenth Circuit Should Be Affirmed

BLM admittedly has ignored significant new evidence that increased use of ORVs may be rendering its NEPA documents obsolete. Under Section 706(1), BLM may be compelled to take a "hard look" at these new circumstances.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

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44. Petitioners also argue that BLM should not be compelled to take a "hard look" because it lacks the resources to do so, and because it plans to take a "hard look" soon. Pet. Br. at 46-47. The Tenth Circuit was properly skeptical of both of these defenses, given their inherent inconsistency. *See Norton*, 301 F.3d at 1239-40. Petitioners further contend that a court may not use Section 706(1) to redirect an agency's use of its resources. But orders compelling acts such as a "hard look" do not improperly rearrange agency resources; if they did, then Petitioners would not concede, as they do, that orders enforcing ministerial duties are appropriate under Section 706(1). Pet. Br. at 21. Finally, Petitioners argue that allowing a court to review the refusal of an agency to take a "hard look" would involve courts too often in the decision making of agencies. Pet. Br. at 47. But federal courts may only compel a "hard look" if it has been delayed "unreasonably," 5 U.S.C. § 706(1), and whether an agency has delayed "unreasonably" turns on several factors, including the extent and significance of the new evidence at issue. Thus, a court could dismiss a complaint that did nothing more than allege the agency's failure to take a "hard look" at an insubstantial piece of new evidence.

Respectfully submitted,

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GALE NORTON,
Secretary of the Interior, et al.,

Petitioners,

v.

SOUTHERN UTAH
WILDERNESS ALLIANCE, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF *AMICI CURIAE* PROFESSORS OF ADMINISTRATIVE AND ENVIRONMENTAL LAW IN SUPPORT OF RESPONDENTS SOUTHERN UTAH WILDERNESS ALLIANCE, ET AL.

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TABLE OF CONTENTS

	Page
INTEREST OF *AMICI*	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. JUDICIAL REVIEW OF AGENCY ACTION IS ESSENTIAL TO THE RULE OF LAW	3
A. Judicial Review Serves Important Societal Interests in Promoting Fidelity to Congressional Purposes, Guarding Against Undue Influence of Private Interests Over the Regulatory Process, and Supporting Public Confidence in Government	3
B. Administrative Law Recognizes a Broad Presumption That Judicial Review of Agency Conduct is Available	5
II. AN AGENCY'S FAILURE TO IMPLEMENT A STATUTORY MANDATE THREATENS THE RULE OF LAW NO LESS THAN AFFIRMATIVE AGENCY ACTION THAT VIOLATES LEGAL REQUIREMENTS	6
A. The Concerns Supporting the Presumptive Availability of Judicial Review for Agency Action Apply With Equal Force to Agency Inaction in Dereliction of Statutory Mandates	6
B. Agency Inaction Poses a Particular Threat to the Rule of Law by Defeating Congressional Policies Intended to Benefit Broad Public Interests	11
C. The Administrative Procedure Act Explicitly Affords Review of Agency Inaction	14

TABLE OF CONTENTS – Continued

Page

III. THE FEDERAL COURTS HAVE AUTHORITY UNDER THE APA TO REVIEW A FEDERAL AGENCY'S INACTION THAT BREACHES A STATUTORY DUTY WITH RESPECT TO MANAGEMENT OF PUBLIC LANDS 17

A. BLM's Assertion That the APA Precludes Judicial Review of Its Failure to Comply With a Mandatory Statutory Duty Misreads the Text of the APA and Contravenes Clear Congressional Intent 17

B. BLM's Interpretation of the APA Would Undermine Core Principles of Administrative Law, Creating a Loophole Permitting Agencies to Escape Judicial Review and Establishing an Inappropriate Double-Standard Favoring Regulated Entities Over Beneficiaries of Statutory Mandates 26

C. Recognition of the Courts' Authority to Review an Agency's Failure to Act That Breaches a Statutory Duty Would Not Lead to Impermissible Judicial Interference in Agency Functions 27

CONCLUSION 30

TABLE OF AUTHORITIES

Page

CASES

Abbott Laboratories v. Gardner, 387 U.S. 136 (1967) 5, 6, 24

Air Line Pilots Ass'n v. CAB, 750 F.2d 81 (D.C. Cir. 1984) 29

Association of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150 (1970) 9

Bennett v. Spear, 520 U.S. 154 (1997) 25

Bowen v. Michigan Academy of Family Physicians, 476 U.S. 667 (1986) 5

Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971) 6

Coalition for Sustainable Resources, Inc. v. United States Forest Service, 259 F.3d 1244 (10th Cir. 2001) 24

Estate of Smith v. Heckler, 747 F.2d 583 (10th Cir. 1984) 28

Frew v. Hawkins, 124 S.Ct. 899 (2004) 29

Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824) 9

Gutierrez de Martinez v. Lamagno, 515 U.S. 417 (1995) 4, 5

Heckler v. Chaney, 470 U.S. 821 (1985) 11, 19

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) 10

Lujan v. National Wildlife Federation, 497 U.S. 871 (1990) 19

Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) 7, 9

TABLE OF AUTHORITIES – Continued

Page

MCI Telecommunications Corp. v. FCC, 627 F.2d 322 (D.C. Cir. 1980) 29

Miller v. Schoene, 276 U.S. 272 (1928) 9

N.A.A.C.P. v. Secretary of Housing and Urban Development, 817 F.2d 149 (1st Cir. 1987) 28

Public Citizen Health Research Group v. Chao, 314 F.3d 143 (3d Cir. 2002) 29

Rochester Tel. Corp. v. United States, 307 U.S. 125 (1939) 11

Roth v. Board of Regents, 408 U.S. 564 (1972) 9

Shalala v. Illinois Council on Long Term Health Care, Inc., 529 U.S. 1 (2000) 4

Sierra Club v. Thomas, 828 F.2d 783 (D.C. Cir. 1987) 24

Standard Oil of Calif. v. Federal Trade Comm'n, 596 F.2d 1381 (9th Cir. 1979) 21

Telecommunications Research and Action Center v. FCC, 750 F.2d 70 (D.C. Cir. 1984) 28

United States v. Nourse, 34 U.S. (9 Pet.) 8 (1835) 4

Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519 (1978) 20

West Coast Hotel v. Parrish, 300 U.S. 379 (1937) 9

Whitman v. American Trucking Associations, Inc., 531 U.S. 457 (2001) 6, 21

TABLE OF AUTHORITIES – Continued

Page

STATUTES

Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.* ..... *passim*

5 U.S.C. § 551(13) 2, 17, 18, 21, 22

5 U.S.C. § 553(a)(2) 19

5 U.S.C. § 701(a) 6, 18

5 U.S.C. § 702 ..... 2, 5, 17, 18, 23

5 U.S.C. § 704 ..... 23, 24

5 U.S.C. § 706 23

5 U.S.C. § 706(1) ..... *passim*

5 U.S.C. § 706(2) 20, 21, 23

Federal Land Policy and Management Act, 43 U.S.C. § 1782(c) 18, 19

LEGISLATIVE HISTORY

S. Rep. No. 79-752, (1945) *reprinted in* ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY 79TH CONGRESS (1946) ..... *passim*

H.R. Rep. No. 79-1980 (1946) *reprinted in* ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY 79TH CONGRESS (1946) ..... *passim*

S. DOC. NO. 8, ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES (1941) 15

LAW REVIEW ARTICLES AND TEXTS

Bruce A. Ackerman, *Beyond* Carolene Products, 98 HARV. L. REV. 713 (1985) 12

TABLE OF AUTHORITIES – Continued

Page

S. BREYER, R. STEWART, C. SUNSTEIN & M. SPITZER, ADMINISTRATIVE LAW AND REGULATORY POLICY 985 (5th ed. 2002) 4, 12

Bureau of Land Management, U.S. Dep't of Interior, HANDBOOK § 8550-1, *Interim Management Policy for Lands Under Wilderness Review* 18

William W. Buzbee, *Expanding the Zone, Tilting the Field: Zone of Interests and Article III Standing Analysis After* Bennett v. Spear, 49 ADMIN. L. REV. 763 (1997) 14

DAVID M. DRIESEN, THE ECONOMIC DYNAMICS OF ENVIRONMENTAL LAW (2003) 13

E. Donald Elliot *et al.*, *Toward a Theory of Statutory Evolution: The Federalization of Environmental Law*, 1 J.L. ECON. & ORG. 313 (1985) 12

LOUIS JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION (1965) 3

Peter H.A. Lehner, Note, *Judicial Review of Administrative Inaction*, 83 COLUM. L. REV. 627 (1983) 4, 10, 24

Jonathan Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223 (1986) 12

Henry P. Monaghan, Marbury *and the Administrative State*, 83 COLUM. L. REV. 1 (1983) 3

ROGER G. NOLL & BRUCE M. OWEN, THE POLITICAL ECONOMY OF DEREGULATION: INTEREST GROUPS IN THE REGULATORY PROCESS (1983) 13

TABLE OF AUTHORITIES – Continued

Page

MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION (1965) 12

RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE (4th ed. 2002) 3, 13

Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59 (1995) 14

Robert A. Schapiro & William W. Buzbee, *Unidimensional Federalism: Power and Perspective in Commerce Clause Adjudication*, 88 CORNELL L. REV. 1199 (2003) 8

KAY SCHLOZMAN & JOHN T. TIERNEY, ORGANIZED INTERESTS AND AMERICAN DEMOCRACY (1986) 13

Daniel P. Selmi, *Jurisdiction to Review Agency Inaction Under Federal Environmental Law*, 72 IND. L.J. 65 (1996) 24

Richard Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669 (1975) 13

Richard Stewart & Cass Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193 (1982) 3

Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421 (1987) 8

Cass R. Sunstein, *Reviewing Agency Inaction After* Heckler v. Chaney, 52 U. CHI. L. REV. 653 (1985) 3, 4, 7, 8, 10

INTEREST OF *AMICI*

The professors of law listed in the appendix, each of whom teaches and conducts research in the fields of administrative and/or environmental law, submit this brief *amicus curiae* in support of the respondents Southern Utah Wilderness Society, *et al.*[1] The *amici* have substantial expertise relevant to the questions of administrative law presented in this case, and strong professional interests in the development of legal rules that promote agency fidelity to public policies established by law and that assure fair and equitable access to the courts for persons whose interests are injured by agency misconduct.

This case raises a fundamental issue of administrative law: whether the federal courts have jurisdiction under the Administrative Procedure Act ("APA") to review inaction by a federal agency when that inaction violates a nondiscretionary statutory mandate imposed by Congress. That question goes to the heart of modern administrative law, which is fundamentally concerned with the relationships among agencies, other institutions of government, and the public, and in particular with the legal principles that constrain and direct the actions of administrative agencies to ensure their fidelity to policies established by law. *Amici* submit this brief to provide the Court with a fuller understanding of the principles of administrative law that properly should inform this Court's decision.

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[1] Counsel for the parties have consented to the filing of this brief. No counsel for a party in this case authored this brief in whole or in part, and no person or entity, other than *amici* or their counsel, made a monetary contribution to the brief's preparation or submission.

SUMMARY OF ARGUMENT

Judicial review is central to the rule of law, serving as an essential check on administrative action that disregards legislative mandates or constitutional rights. For this reason, the courts have long recognized a presumption in favor of providing judicial review of executive action. The modern understanding of administrative law recognizes that agency inaction that is in dereliction of a statutory command can inflict injury on legally-protected interests that is as damaging as affirmative agency action taken in violation of statutory limitations. For these reasons, the APA explicitly provides for judicial review of an agency's failure to act. 5 U.S.C. §§ 551(13), 702.

The position taken by the Bureau of Land Management ("BLM") in this case – that the federal courts lack jurisdiction to hear claims that federal agencies have failed to carry out legislative mandates except in the most limited circumstances – conflicts with these basic principles of modern administrative law. BLM's legal argument misreads the relevant language of the APA, and disregards Congress's clear intent that the APA "afford a remedy for every legal wrong." S. Rep. No. 79-752, at 7 (1945). BLM's position would, if accepted by this Court, create a significant gap in the ability of the courts to constrain executive agencies to follow the will of Congress. It would also establish a fundamental imbalance in the ability of persons whose interests are injured by federal agency misconduct to obtain a remedy, improperly favoring those who are regulated directly by agency action while disfavoring the beneficiaries of statutory mandates established to protect and promote specific public interests. Both outcomes would undermine the rule of law in this country.

ARGUMENT

I. JUDICIAL REVIEW OF AGENCY ACTION IS ESSENTIAL TO THE RULE OF LAW

A. Judicial Review Serves Important Societal Interests in Promoting Fidelity to Congressional Purposes, Guarding Against Undue Influence of Private Interests Over the Regulatory Process, and Supporting Public Confidence in Government

Judicial review of agency action serves important societal purposes, broadly embodied in the notion of the rule of law.[2] Judicial review promotes fidelity by agencies to statutory directives and guards against undue influence by private interests in the regulatory process.[3] The lack of normal safeguards of electoral accountability and separation of powers for administrative agencies makes concerns regarding factional influence over governmental processes and disregard of democratically-reached public policies especially intense in the administrative context.[4] The availability of judicial review for persons injured by agency action moderates these concerns, serving as an

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[2] *See* LOUIS JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 320-27 (1965); Richard Stewart & Cass Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193, 1203 (1982) (discussing functions of rule of law).

[3] *See* RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 16.11 (4th ed. 2002) (judicial review furthers two related goals: "(1) reduction of the risk that agencies will engage in lawless conduct and (2) reduction of the risk that agency decisionmaking will be infected by factional bias"); Henry P. Monaghan, Marbury *and the Administrative State,* 83 COLUM. L. REV. 1, 33 (1983).

[4] Cass R. Sunstein, *Reviewing Agency Inaction After* Heckler v. Chaney, 52 U.CHI. L. REV. 653, 655 (1985).

essential constraint upon the exercise of arbitrary or venal power by administrative agencies.[5]

The role of judicial review in assuring the rule of law is deeply rooted in our governmental system. Justice Thomas has observed: "Our constitutional structure contemplates judicial review as a check on administrative action that is in disregard of legislative mandates or constitutional rights." *Shalala v. Illinois Council on Long Term Health Care, Inc.*, 529 U.S. 1, 44 (Thomas, J., dissenting).[6] As this Court has noted, Chief Justice Marshall "long ago captured the essential idea" when he observed that "'a government of laws and of principle'" could not leave persons injured by unlawful official conduct without a remedy. *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 424 (1995), quoting *United States v. Nourse*, 34 U.S. (9 Pet.) 8, 28-29 (1835). In the largest sense, judicial review "provides, and has always provided, vital legitimacy to actions of administrative agencies in the American system of government." Peter H.A. Lehner, Note, *Judicial Review of Administrative Inaction*, 83 COLUM. L. REV. 627 (1983).

[5] *See* Sunstein, *Reviewing Agency Inaction*, *supra*, at 656 (noting that the prospect of review increases the likelihood of fidelity to substantive and procedural norms during the decision making process long before judicial review is invoked).

[6] *See* S. BREYER, R. STEWART, C. SUNSTEIN & M. SPITZER, ADMINISTRATIVE LAW AND REGULATORY POLICY 985 (5th ed. 2002) ("[T]he presumption of review owes its source to considerations of accountability and legislative supremacy, ideas embodied in article I, and also to rule of law considerations, embodied in the due process clause. . . . ").

B. Administrative Law Recognizes a Broad Presumption That Judicial Review of Agency Conduct is Available

For these reasons, the federal courts have historically adopted a presumption in favor of the availability of judicial review of agency action. The Court concluded in *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967), that "a survey of our cases shows that judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." Thus, "federal judges traditionally proceed from the 'strong presumption that Congress intends judicial review.'" *Gutierrez de Martinez*, *supra*, 515 U.S. at 424 (quoting *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986)).

The Court recognized in *Abbott Laboratories* that the general expectation in administrative law that judicial review be available was "reinforced" by the enactment of the Administrative Procedure Act. 387 U.S. at 140. The APA "embodies the basic presumption of judicial review to one 'suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action.'" *Id.* (quoting 5 U.S.C. § 702). The framers of the APA designed the judicial review provisions of the Act to "afford a remedy for every legal wrong," S. Rep. No. 79-752, at 7 (1945) (hereinafter S. Rep.), *reprinted in* ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY 79TH CONGRESS at 193 (1946) (hereinafter LEG. HIS.); H.R. Rep. No. 79-1980, at 17 (1946) (hereinafter H.R. Rep.), *reprinted in* LEG. HIS. at 251,[7] and defined "agency action" broadly to "assure

[7] For convenience, references to the legislative history of the APA are hereinafter made to the published volume, and cited as LEG. HIS.

the complete coverage of every form of agency power, proceeding, action or inaction." LEG. HIS. at 198 (S. Rep.); 255 (H.R. Rep.). This Court has accordingly recognized that the Act "is meant to cover comprehensively every manner in which an agency may exercise its power," *Whitman v. American Trucking Associations, Inc.*, 531 U.S. 457, 478 (2001), and emphasized that the Act's "'generous review provisions' must be given a 'hospitable' interpretation." *Abbott Laboratories*, *supra*, 387 U.S. at 141. Thus, "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review." *Id.*[8]

II. AN AGENCY'S FAILURE TO IMPLEMENT A STATUTORY MANDATE THREATENS THE RULE OF LAW NO LESS THAN AFFIRMATIVE AGENCY ACTION THAT VIOLATES LEGAL REQUIREMENTS

A. The Concerns Supporting the Presumptive Availability of Judicial Review for Agency Action Apply With Equal Force to Agency Inaction in Dereliction of Statutory Mandates

From its earliest days, this Court has recognized that judicial relief is warranted where an executive officer has

[8] While the Act creates exceptions to the presumption of reviewability, the exceptions are narrow: judicial review of an agency's final action will be denied only where it is (1) expressly precluded by statute or (2) committed by law to an agency's discretion. 5 U.S.C. § 701(a). *See Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971) (exception for action "committed to agency discretion" applicable only in "rare instances where statutes are drawn in such broad terms that in a given case there is no law to apply") (internal quotations omitted). BLM does not invoke either exception in this case.

failed to perform a mandatory duty. Faced with a request for mandamus to compel an administrative action – delivery of executed commissions of appointment to office – alleged to have been withheld unlawfully by the Secretary of State, Justice Marshall observed in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), that "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Id.* at 163. That basic right to a judicial remedy extends, as Justice Marshall made resoundingly clear in *Marbury*, to administrative inaction that impairs legal rights, no matter how lofty the public officer may be: "[W]here a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy." *Id.* at 166.

The need for the courts to provide a remedy for unlawful administrative defaults has become more compelling, and better recognized, as the modern administrative state has evolved. The development of modern administrative law can be traced in significant measure from the recognition that statutorily-granted rights have equal entitlement to judicial protection as traditional common-law rights.[9] The pre-New Deal understanding of the role of the courts in reviewing administrative conduct was based on the assumptions that market ordering within the constraints of the common law formed a natural baseline, and that the

[9] Indeed, "[t]he rise of the modern regulatory state results in large part from an understanding that government 'inaction' is itself a decision and may have serious adverse consequences for affected citizens." Sunstein, *Reviewing Agency Inaction*, *supra*, at 683.

courts should accordingly be vigilant to protect traditional private rights from improper government intervention.[10] This traditional paradigm constrained the courts' willingness to respond to claims of agency failure to act: the presumption in favor of the existing status quo amounted to a "one-way ratchet" imposing legally enforceable restraints on government regulation, but not on inaction, while the beneficiaries of such regulation, lacking traditional liberty or property interests, were relegated to the political process when agencies failed to implement the law.[11]

Modern administrative law, developed in parallel with the rise of the modern regulatory state, has decisively rejected this limited view of courts' role in vindicating statutorily-granted rights. As recognized by the courts and legal scholars for nearly three-quarters of a century, common-law rights and statutory rights equally reflect policy judgments by government decision makers. Thus, nothing about the common law basis of a right endows it with higher status than a right the legislature has found appropriate to bestow.[12] From early in the 20th Century, this Court's decisions recognized that common law ordering is

[10] *See* Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 474-75, 501-03 (1987).

[11] Sunstein, *Reviewing Agency Inaction*, *supra*, at 666-67.

[12] *See, e.g.*, Robert A. Schapiro & William W. Buzbee, *Unidimensional Federalism: Power and Perspective in Commerce Clause Adjudication*, 88 CORNELL L. REV. 1199, 1204 n.18 (2003) ("The New Deal Court's rejection of *Lochner* recognized the artificiality of a privileged legal status quo. In validating the modern regulatory state, the New Deal Court acknowledged the parity of targets and beneficiaries of regulation.... Only if the enforcement of contract, property, and trespass laws is ignored can the economics of 'laissez-faire' be understood to reflect the absence of governmental intervention.").

not a natural status quo, and that both action and inaction reflect government choices. *West Coast Hotel v. Parrish*, 300 U.S. 379, 399 (1937) (suggesting that in the absence of minimum wage laws community relief programs would "provide what is in effect a subsidy for unconscionable employers"); *Miller v. Schoene*, 276 U.S. 272, 279 (1928) ("It would have been none the less a choice if, instead of enacting the present statute, the state, by doing nothing, had permitted serious injury . . . to go on unchecked.").

Modern administrative law reflects this understanding. Thus, for example, modern procedural due process doctrine recognizes that statutorily-granted interests, no less than traditional common-law rights, may constitute property subject to constitutional protections. *See Roth v. Board of Regents*, 408 U.S. 564 (1972). Similarly, this Court's standing decisions have dispensed with any requirement that a plaintiff possess a "legal right" in favor of a looser requirement that the plaintiff suffer actual injury that is "arguably within the zone of interests protected by a statute." *See Association of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970). The need for the modern judiciary to be sensitive to the vindication of statutorily-granted rights has been expressed eloquently by Justice Kennedy:

> As Government programs and policies become more complex and farreaching, we must be sensitive to the articulation of new rights of action that do not have clear analogs in our common-law tradition. Modern litigation has progressed far from the paradigm of Marbury suing Madison to get his commission, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803), or Ogden seeking an injunction to halt Gibbons' steamboat operations, *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 6 L.Ed. 23 (1824). In my view, Congress has the power to define injuries and articulate chains

> of causation that will give rise to a case or controversy where none existed before. . . .

Lujan v. Defenders of Wildlife, 504 U.S. 555, 580 (1992) (Kennedy, J. concurring).

The modern understanding that the common law does not form a natural baseline, and that statutorily-conferred rights are as deserving of judicial protection as common law-based rights, compels recognition that agency *inaction* in dereliction of a statutory mandate is as threatening to legally-protected interests as agency *action* that violates statutory requirements. Just as holders of common law rights may find their interests injured by governmental regulation that alters the pre-existing status quo, the holders of statutorily-granted rights are vulnerable to an agency's failure to act that leaves intact a harmful status quo. The very establishment of statutory programs, and the creation of agencies to administer them, reflect Congress's recognition that interests not recognized by the common law deserve governmental protection, and the failure of an agency to implement a Congressional command directly harms those statutorily-protected interests.[13] Nonimplementation of a statutory mandate intended to promote societal interests in health and welfare, for example, can result in the public's continued exposure to pollutants, safety hazards, unfair trade practices, or other evils that Congress sought to eliminate, or in the degradation of lands held by law as a resource for public use and enjoyment. Nonimplementation also erodes faith in the legal system, undermining government legitimacy.[14]

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[13] Sunstein, *Reviewing Agency Inaction*, *supra*, at 630.

[14] *See* Lehner, *Judicial Review of Administrative Inaction*, *supra*, at 630.

For these reasons, as Justice Frankfurter recognized in *Rochester Tel. Corp. v. United States*, 307 U.S. 125, 140-42 (1939), the distinction between inaction and action in the context of modern administrative law "is as unilluminating and mischief-making a distinction as the outmoded line between 'nonfeasance' and 'malfeasance.'" The role of judicial review in promoting adherence to statutory goals, and in guarding against arbitrary decision making, is as vitally necessary with respect to agency defaults as to agency excesses.[15]

B. Agency Inaction Poses A Particular Threat to the Rule of Law by Defeating Congressional Policies Intended to Benefit Broad Public Interests

By threatening the accomplishment of programs adopted by Congress to benefit broad public interests, agency inaction may be particularly threatening to the rule of law. Many regulatory statutes seek to benefit interests held by a wide class of people. Indeed, a primary

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[15] This Court has recognized that the decision to commence enforcement proceedings has traditionally been viewed as committed to agency discretion. *Heckler v. Chaney*, 470 U.S. 821, 832 (1985). The Court noted that such decisions are only "presumptively unreviewable," however, *id.*, and emphasized that judicial review of agency inaction is appropriate even with respect to enforcement matters where the governing statute provides meaningful standards to restrain the agency's discretion. *Id.* at 834. The Court's recognition of a rebuttable presumption for enforcement discretion thus does not undercut the general principle that an agency's failure to act is subject to review where there is "law to apply." As the Court noted: "[I]n establishing this presumption in the APA, Congress did not set agencies free to disregard legislative direction in the statutory scheme that the agency administers." *Id.* at 833.

justification for statutory regulation is to ensure that a diffuse public interest is served, for example, by providing a public good.[16] But the very diffuseness of the public interest often renders beneficiaries less politically influential than those whom the statute regulates. Individual regulated parties tend to feel the burdens of regulation more sharply than individual beneficiaries feel the benefit. Thus, political vindication of beneficiary interests may encounter serious collective action problems.[17] Such problems include free-rider issues: when the benefit of a statute is generally available no individual beneficiary may be motivated to defend it, preferring instead to "free-ride" on the effort of other beneficiaries.[18] Moreover, advocates of broadly-shared interests may face serious transaction costs, in identifying like-minded individuals, for example, and convincing them to pursue concerted political action.[19] By contrast, regulated parties may be smaller in number, be more familiar with each other by virtue of engaging in the same regulated activity, and feel regulatory burdens more acutely.[20] Moreover, regulated parties may have far superior financial resources to bring to bear on regulatory processes affecting their economic

[16] *See, e.g.*, BREYER, ADMINISTRATIVE LAW AND REGULATORY POLICY 7 (5th ed. 2002).

[17] *See generally* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION (1965); PIERCE, ADMINISTRATIVE LAW TREATISE, § 16.11 (4th ed. 2002).

[18] *See, e.g.*, Jonathan Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 231 n.44 (1986); E. Donald Elliot, *et al.*, *Toward a Theory of Statutory Evolution: The Federalization of Environmental Law*, 1 J.L. ECON. & ORG. 313, 342 (1985).

[19] *See, e.g.*, OLSON, *supra*, at 48; *see also* Bruce A. Ackerman, *Beyond* Carolene Products, 98 HARV. L. REV. 713 (1985).

[20] *See* OLSON, *supra*, at 33-36; Macey, *supra* n.10, at 229.

interests.[21] As a result, regulated parties often exert more effective political influence than regulatory beneficiaries.[22]

The relative ineffectiveness of diffuse public interests in the political process combines with "agency capture," the tendency of regulatory agencies over time to become the servants of the interests they are ostensibly regulating, to undercut the ability of statutory beneficiaries to protect and vindicate their interests through political or administrative channels. As Professor Richard Stewart has observed, "It has become widely accepted, not only by public interest lawyers, but by academic critics, legislators, judges and even by some agency members, that the comparative over-representation of regulated or client interests in the process of agency decision results in a persistent policy bias in favor of these interests." Richard Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1713 (1975).[23]

In the absence of effective judicial review for agency failures to implement a statutory mandate, the statute's beneficiaries would thus face serious difficulty in obtaining redress, either from the agency or from the political process. Requiring citizens to return to the political

[21] *See* DAVID M. DRIESEN, THE ECONOMIC DYNAMICS OF ENVIRONMENTAL LAW 114-116 (2003) (noting that regulated industries routinely devote a portion of their revenues to hire lawyers, lobbyists and scientists to argue against strict regulation of their activities, and therefore participate very heavily in regulatory processes).

[22] *See, e.g.*, KAY SCHLOZMAN & JOHN T. TIERNEY, ORGANIZED INTERESTS AND AMERICAN DEMOCRACY 400 (1986); ROGER G. NOLL & BRUCE M. OWEN, THE POLITICAL ECONOMY OF DEREGULATION: INTEREST GROUPS IN THE REGULATORY PROCESS 41-53 (1983).

[23] *See also* PIERCE, ADMINISTRATIVE LAW TREATISE § 16.11 (citing studies documenting capture).

process to enforce legislative victories already obtained would impose a double and unfair burden on them. Moreover, in the absence of a credible threat of judicial scrutiny at the behest of statutory beneficiaries, the tendency of an agency to skew its decision making in favor of regulated entities, who can readily obtain review of agency action affecting their interests, would be exacerbated.[24]

C. The Administrative Procedure Act Explicitly Affords Review of Agency Inaction

Concerns about the failure of existing legal and administrative mechanisms to protect the interests of regulatory beneficiaries underlie the adoption of the Administrative Procedure Act. In its 1941 report, the Attorney General's Committee on Administrative Procedure found that judicial review effectively checked agency excesses in derogation of private legal rights, but stated:

> From the point of view of public policy and public interest, it is important not only that the administrator should not improperly encroach on private

[24] *See, e.g.*, William W. Buzbee, *Expanding the Zone, Tilting the Field: Zone of Interests and Article III Standing Analysis After* Bennett v. Spear, 49 ADMIN. L. REV. 763, 768-72 (1997); Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 87-88 (1995) ("[O]nce agencies know that statutory beneficiaries cannot invoke judicial enforcement of the duty to engage in reasoned decision making, agencies can safely ignore comments filed by beneficiaries. . . . All regulatory agencies will soon resemble the Interstate Commerce Commission (ICC) of the 1950's.").

> right but also that he should effectively discharge his statutory obligations. Excessive favor of private interest may be as prejudicial as excessive encroachment. . . . A Federal Trade Commission may violate the legislative policy and cause harm to private interests by failing to investigate and detect unfair methods of competition as well as by overzealously condemning fair methods.

S. DOC. NO. 8, ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES 76 (1941). The Committee observed that judicial review at that time was rarely available to compel effective enforcement of the law by administrators, and noted that "the problem of whether the administrator's refusal to take action is reviewable remains." *Id.* at 86.

Some bills introduced during Congress's consideration of the APA addressed the problem identified by the Attorney General's Committee in only limited ways. Provisions for judicial review of agency conduct in various House bills either ignored the issue of inaction, *see* LEG. HIS. at 131-39 (H.R. 184), or offered a remedy for inaction only where an agency's action was "short of statutory right, grant, privilege or benefit" or for an agency's "neglect, failure, or refusal" to act upon "applications" to the agency for a rule, order, or permission. LEG. HIS. at 145-46 (H.R. 339); 154 (H.R. 1117); *see also* 176 (H.R. 1206) (judicial review provided for final decisions "rendered pursuant to the formal procedures provided herein").

In contrast, however, the Senate bill that ultimately became the APA, S.7, took a broad approach to judicial review, in order to "afford a remedy for every legal wrong." LEG. HIS. at 193 (S. Rep.). *See* LEG. HIS. at 192 (S. Rep.) (noting that S.7 "contains more comprehensive provisions for judicial review for the redress of any legal wrong" than a predecessor bill). The Senate bill defined "agency action"

expansively as including affirmative actions such as rules, orders, licenses, etc., and the denial of such affirmative relief. LEG. HIS. at 218 (S.7). However, to "assure the complete coverage of every form of agency power, proceeding, action, or inaction," LEG. HIS. at 198 (S. Rep.), S.7 went farther by explicitly adding the term "*failure to act*" to the definition of agency action. LEG. HIS. at 218 (S.7) (emphasis added).[25] The judicial review provisions of the Senate bill incorporated the broad definition of agency action, affording a right of review to "[a]ny person suffering legal wrong because of *any* agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute." LEG. HIS. at 222 (S.7) (emphasis added). Finally, S.7 explicitly affirmed the power of the reviewing court to "compel agency action unlawfully withheld or unreasonably delayed." *Id.*[26]

[25] None of the other bills then under consideration before the 79th Congress, including H.R. 1203, the bill introduced in the House as a counterpart to S.7, included this term. *See generally* LEG. HIS. at 131-83 (setting forth text of House bills under consideration), 156 (H.R. 1203).

[26] These provisions received favorable attention in the Congressional debate preceding enactment of the APA. Senator McCarran, Chairman of the Senate Judiciary Committee that authored the bill, emphasized the bill's provisions for judicial review, noting that "it is something in which the American public has been and is much concerned, harkening back, if we may, to the Constitution of the United States, which sets up the judicial branch of the Government for the redress of human wrongs and for the enforcement of human rights." LEG. HIS. at 305. Congressman Springer of Indiana placed particular emphasis on the provision empowering reviewing courts to compel agency action unlawfully withheld or unreasonably delayed, noting: "In many of those cases there has been a withholding or a long delay, and that particular feature is intended to hasten action on the part of these agencies. I feel confident each Member will approve that provision in this bill." LEG. HIS. at 377.

The provisions of the Senate bill providing expansive judicial review were enacted unchanged in the final Administrative Procedure Act.[27] *See* 5 U.S.C. §§ 551(13) (definition of "agency action"); 702 (right of review); 706(1) (scope of review to compel agency action). The APA thus provided a comprehensive remedy for agency inaction, in keeping with the Congressional determination "to afford a remedy for every legal wrong."

III. THE FEDERAL COURTS HAVE AUTHORITY UNDER THE APA TO REVIEW A FEDERAL AGENCY'S INACTION THAT BREACHES A STATUTORY DUTY WITH RESPECT TO MANAGEMENT OF PUBLIC LANDS

A. BLM's Assertion That the APA Precludes Judicial Review of Its Failure to Comply With A Mandatory Statutory Duty Misreads the Text of the APA and Contravenes Clear Congressional Intent

The Federal Land Policy and Management Act imposes a clear, mandatory duty upon the Secretary of the Interior with respect to management of federal lands identified as potential wilderness areas: "During the period of review of such areas and until Congress has determined otherwise, *the Secretary shall continue to manage such lands* according to his authority under this Act and other applicable law *in a manner so as not to*

[27] The bill enacted was a House substitute for S.7 that incorporated its terms with minor revisions and additions; the definition of "agency action" and the provisions for judicial review were substantively unchanged. *See* LEG. HIS. at 284, 288-89.

impair the suitability of such areas for preservation as wilderness. . . . " 43 U.S.C. § 1782(c) (emphases added). The Department of the Interior has adopted formal guidance interpreting what constitutes "impairment" of the suitability of wilderness study areas. *See* BLM, U.S. Dep't of Interior, HANDBOOK § 8550-1, *Interim Management Policy for Lands Under Wilderness Review*. BLM's guidance recognizes that the cross-country operation of motor vehicles impairs the wilderness values of such areas by creating new tracks and roads, and prohibits the agency from permitting such motor vehicle use within wilderness study areas except in emergencies or for official purposes. *Id.* Ch. 1.B.3, 1.B.11.

A failure by the Secretary to fulfill her affirmative duty to manage potential wilderness areas so as to maintain their suitability for preservation as wilderness constitutes a "failure to act" within the plain meaning of the APA, and is thus subject to judicial review under that Act. The Act includes "failure to act" within the definition of "agency action" subject to judicial review, 5 U.S.C. §§ 551(13), 702, and authorizes the courts to "compel agency action unlawfully withheld or unreasonably delayed." *Id.* § 706(1). The statutory duty imposed on the Secretary with respect to the management of these lands is mandatory, not discretionary, *see* 43 U.S.C. § 1782(c) ("the Secretary *shall* continue to manage . . . "), and BLM does not suggest that review is precluded by statute or that the agency's conduct is committed to agency discretion by law. *See* 5 U.S.C. § 701(a).[28] Where, as here,

[28] Although BLM repeatedly suggests that judicial review in this case may interfere with its discretion in managing the public lands, it

(Continued on following page)

plaintiffs allege that the Secretary's conduct has breached her statutory duty under FLPMA, the federal courts plainly have subject matter jurisdiction to hear the claim.

BLM argues, however, that the APA does not grant the courts authority to review failures by land management agencies to act except in extremely narrow circumstances. As an initial matter, BLM's suggestion that land management agencies deserve special exemption under the Act appears simply self-serving. Apart from its exemption of "matters relating to . . . public property" from notice and comment rulemaking procedures, 5 U.S.C. § 553(a)(2), the APA does not treat land management agencies differently in any respect from other federal agencies.[29] Given the importance of judicial review to administrative law, this Court should be

has never claimed that management of these lands is committed to its absolute discretion by law. Nor could it; the specific, non-discretionary duty imposed by § 1782(c) of FLPMA, together with other provisions in that detailed statute, preclude any such claim. Similarly, the broad discretion exercised by agencies in enforcement, recognized by this Court in *Heckler v. Chaney, supra,* is not at issue here. Indeed, BLM does not rely upon *Heckler* in its argument.

[29] BLM repeatedly invokes this Court's decision in *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990), for the proposition that an agency's "day-to-day administration of its programs" cannot be reviewed. *See, e.g.*, Petitioners' Brief at 15. BLM misreads *Lujan*, however. In *Lujan*, the Court rejected an attempt by plaintiffs to aggregate a large number of individual actions into a single reviewable "program." The Court found that the alleged "land withdrawal program" was not an identifiable agency action that could receive "wholesale" review. *Id.* at 891. The Court did *not*, however, suggest that the plaintiffs could not seek judicial review of the agency's conduct in these matters at all; to the contrary, it simply directed plaintiffs to bring their complaints regarding the agency's conduct in "case-by-case" challenges. *Id.* at 894. The plaintiffs here have done so, raising challenges to BLM's management of particular lands.

wary of attempts by federal agencies to carve out for themselves broad exemptions from judicial scrutiny.

More basically, however, BLM's legal argument is premised on a wishful misreading of the text of the APA, and conflicts with clear Congressional intent to afford expansive judicial review.[30] BLM argues, first, that the Act's definition of "agency action" must be read as limited to specific "discrete products of a focused decision making process by the agency," such as rules, orders, licenses, sanctions and relief. Petitioners' Brief at 13. Next, BLM posits that the term "failure to act" must mean a failure to take such formal agency action. Based on this syllogism, BLM argues that the relief available under § 706(1) and § 706(2) of the Act must also be perfectly symmetrical: the only actions that may be compelled under § 706(1), in BLM's view, are discrete actions that would be reviewable under § 706(2) if taken by an agency. Finally, BLM overlays this argument with the notion of finality, arguing that judicial review under either

[30] BLM relies for its view of Congressional intent almost exclusively upon the views expressed by the Department of Justice to the Congress as it considered the Act. *See* Petitioners' Brief at 18-25 (discussing the 1941 report of the Attorney General's Committee on Administrative Procedure and the post-enactment Attorney General's Manual on the Administrative Procedure Act, while citing actual statements of Congressional committees or Congressmen only twice – once for the Senate Report's description of the Attorney General's Committee's "contribution"). While this Court has given the Attorney General's Manual on the Administrative Procedure Act "some deference," given the role played by the Department of Justice in the legislative process, *see, e.g., Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 546 (1978), it cannot supersede actual evidence of Congressional intent, such as the reports of the Congressional committees who drafted the APA.

§ 706(1) or § 706(2) is limited to final, discrete agency actions that have been taken or withheld.

BLM's convoluted interpretation is contrary both to the actual text of the Act and to the legislative history. BLM's first premise reads § 551(13)'s definition of "agency action" as an exclusive listing of discrete formal acts, effectively ignoring the word "includes." As the statute's use of that word indicates, however, the definition of "agency action" in § 551(13) is inclusive and exemplary, not exclusive. *See Standard Oil of Calif. v. Federal Trade Comm'n*, 596 F.2d 1381, 1384 (9th Cir. 1979) (§ 551(13) is "illustrative rather than exclusive"), *rev'd on other grounds*, 449 U.S. 232, 238 n.7 (1980) (agreeing with court of appeals regarding the existence of agency action, but finding it non-final). The term "agency action" was intentionally defined broadly by Congress to "assure the complete coverage of every form of agency power, proceeding, action or inaction," LEG. HIS. at 198 (S. Rep.), 255 (H.R. Rep.), in keeping with Congress's overarching resolve to "afford a remedy for every legal wrong." LEG. HIS. at 193 (S. Rep.), 251 (H.R. Rep.). As this Court has accordingly recognized, the Act "is meant to cover comprehensively *every manner in which an agency may exercise its power.*" *Whitman v. American Trucking Associations, Inc.*, 531 U.S. 457, 478 (2001) (emphasis added).

The phrase "failure to act," moreover, is not limited, as BLM suggests, to the failure to take a discrete formal action like the issuance of a rule or order. BLM treats the statutory phrase "failure to act" in § 551(13) as if it read, instead, "failure to take *such action.*" In BLM's view, the statutory definition would thus read "agency action includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or the *failure to take such action.*" The actual text of this provision does not link a "failure to act" to the exemplars

of affirmative agency action it lists, however, and the structure of the provision does not support any inference that it is so limited. If Congress had meant to define "failure to act" narrowly as a "failure to *take such action*," it plainly could have done so, as it did by defining agency action to include the listed examples and "the equivalent or denial thereof."

As discussed above, the phrase "failure to act" was added separately in the Senate bill to the definition of "agency action" used in other bills then under consideration. Given the understanding, widely accepted by the time the APA was enacted, that agency inaction can constitute an exercise of agency power fully as much as agency action, Congress's deliberate inclusion of the term "failure to act" within the meaning of "agency action" must be read broadly to include any form of agency default that injures persons holding statutorily-protected interests. Congress in fact *declined* to enact proposed bills that would have defined "agency action" more narrowly, by omitting the term "failure to act" or by restricting judicial review to final decisions rendered pursuant to formal procedures. *See supra*, at 13-14. Indeed, one such failed bill proposed virtually the *exact* approach that BLM now wishes to read into § 551(13), permitting review only of particular final actions and agency failures to take such final actions. *See* LEG. HIS. at 154 (H.R. 1117) (restricting judicial review to "final actions, rules, or orders, or those for which there is no other adequate judicial remedy (*including the neglect, failure, or refusal of an agency to act upon any application for a rule, order, permission*, or the amendment or modification thereof, within the time prescribed by law or within a reasonable time) . . . ") (emphasis added). Congress's decision instead to define reviewable agency action broadly to include any "failure to act" must therefore be understood as rejecting the narrow interpretation now offered by BLM.

Without BLM's restrictive, and erroneous reading of "agency action" and "failure to act," the agency's argument that the provisions of § 706(1) and (2) are narrow mirrors, providing review only of discrete formal decisions taken or withheld, falls of its own weight. Nothing in either provision, or in the Act's legislative history, supports that view. Section 706 defines the standard of review for the courts in actions under the APA. It cannot be read as limiting or otherwise governing the right to review conferred by § 702, and is simply irrelevant to the issue whether judicial review is *available*. The provisions of § 706(1) and (2) are indeed complementary, but they reflect the different functions of the courts when faced, respectively, with inaction and action. Section 706(1) specifies the scope of review for an agency's "failure to act"; its reference to "agency action unlawfully withheld or unreasonably delayed" must be read as referring to that term, and it provides specific authority for the courts to remedy such a failure by compelling appropriate action to achieve compliance with a statutory command, regardless of whether such action takes the form of discrete, formal decisions. Section 706(2), by contrast, sets the scope of review for affirmative agency actions, authorizing the courts to "hold unlawful and set aside" such affirmative acts when they violate the applicable legal standard.

Finally, BLM's invocation of the finality requirement is simply misplaced. While the doctrine of finality applies to a claim for judicial review of agency inaction, the text of the APA does not support BLM's reading of § 706(1) as affording the courts authority to compel only discrete agency action that would be final if taken. It is § 704 that limits judicial review (unless otherwise provided by statute) to "final agency action." When "agency action" in that provision is read to embrace "failure to act," the plain meaning of § 704 is that the courts

may review any "*final failure to act*" (not, as BLM would have it, any "failure to take final action"). This is the construction of §§ 704 and 706(1) that the federal courts have long adopted when faced with claims of unlawful inaction or unreasonable delay on the part of a federal agency. As the court of appeals explained in this case:

> Once the agency's delay in carrying out [a mandatory duty] becomes unreasonable, or once the established statutory deadline for carrying out that duty lapses, the agency's inaction under these circumstances is, in essence, the same as if the agency had issued a final order or rule declaring that it would not complete its legally required duty.

Pet. App. at 16a. *See also, e.g., Coalition for Sustainable Resources, Inc. v. United States Forest Service*, 259 F.3d 1244, 1251 (10th Cir. 2001); *Sierra Club v. Thomas*, 828 F.2d 783, 793 (D.C. Cir. 1987) ("[I]f an agency is under an unequivocal statutory duty to act, failure to do so constitutes, in effect, an affirmative act that triggers 'final agency action' review.").[31]

The recognition by the courts that an agency's failure to act must at some point be deemed "final" is consistent with this Court's teaching in *Abbott Laboratories* that finality is to be determined in a "pragmatic" and "flexible" manner. 387 U.S. at 149-50. Although an affirmative agency action is not considered final unless it marks the "consummation" of the agency's decision making process,

[31] *See also* Daniel P. Selmi, *Jurisdiction to Review Agency Inaction Under Federal Environmental Law*, 72 IND. L.J. 65, 99-101 (1996) (discussing constructive agency action); Lehner, *Judicial Review of Administrative Inaction*, *supra*, 83 COLUM. L. REV. at 652-55 (1983).

Bennett v. Spear, 520 U.S. 154, 177-78 (1997), an agency's failure to act may result as readily from neglect as from deliberate decision. Requiring a deliberate decision not to act before permitting judicial review would inappropriately entangle the courts in searching for agency motives on poorly-defined records. Indeed, requiring a demonstrable decision not to act before permitting judicial review would encourage agencies not to make such decisions, or at least not to document them, in order to evade judicial review. More broadly, it would preclude judicial review altogether of agency inaction that is the product of neglect, rather than defiance, no matter how egregiously it may derogate from Congressional direction. Finally, requiring such a decision before permitting judicial review squarely collides with § 706(1)'s authorization to courts to compel agency action "unreasonably delayed." If that provision means anything, it must mean that a failure to decide, if it amounts to "unreasonable delay," can be corrected by a court. For these reasons, the courts have properly focused on whether the agency's *failure* to act is effectively final, either because it violates a statutory deadline or because it constitutes unreasonable delay.

The second element of finality, that an agency's action have concrete real-world impact, *see Bennett v. Spear, supra,* at 178 (final action is "one by which rights or obligations have been determined, or from which legal consequences will flow") (internal quotes omitted), is also satisfied where an agency's failure to act inflicts actual injury on statutorily-protected interests, concretely affecting the legal rights of parties holding such interests. Where an agency's failure to adhere to a statutory mandate demonstrably injures statutorily-protected interests, such as those of wilderness users in this case, that failure must be deemed final.

B. BLM's Interpretation of the APA Would Undermine Core Principles of Administrative Law, Creating a Loophole Permitting Agencies to Escape Judicial Review and Establishing an Inappropriate Double-Standard Favoring Regulated Entities Over Beneficiaries of Statutory Mandates

BLM's erroneous and restrictive interpretation of the APA would undercut principles of administrative law that are central to the notion of the rule of law. As *amici* have shown, judicial review is a critical check on lawless agency behavior, enforcing fidelity to statutory directives, deterring improper influence by private parties over agency regulatory processes, and fostering public faith in the legitimacy of government. By carving out a broad and ill-defined exemption for land management agency administration of statutory programs, BLM's interpretation of the Act would create, as the court of appeals noted, a "no-man's-land" of judicial review "in which a federal agency could f[lout] mandatory, non-discretionary duties simply because it might be able to satisfy these duties through some form of non-final action." Pet. App. 18a n.10. BLM's response can only be termed imperious: persons injured by such lawless conduct should, BLM submits, simply ask the offending agency to correct its failure to act. The agency may then, in its sole discretion, choose to respond to such a request in a manner that "could" serve as the basis for "any judicial review that may be available." Petitioners' Brief at 29; *see also id.* at 36. BLM acknowledges that an agency would be under no legal duty even to respond to such a petition. Petitioners' Brief at 29. BLM and other agencies can hardly be expected to miss the point that they may escape judicial scrutiny altogether simply by ignoring public complaints.

Moreover, by artificially constricting judicial review of agency inaction, BLM's position would re-establish a double standard, obsolete in administrative law since the New Deal era, favoring the interests of regulated parties over the interests of beneficiaries of statutory programs. As *amici* have shown, agency inaction poses particular threats to the implementation of broad public policies and to the alleviation of non-traditional harms recognized by Congress. Precluding judicial review of an agency's failure to implement a statutory mandate would leave the beneficiaries of statutory programs without a judicial remedy for agency default, and as *amici* have noted, without effective political recourse. By contrast, under BLM's theory, persons directly regulated or restricted by an agency would always have a judicial remedy: in the case at hand, for example, off-road vehicle users would have the right to challenge any final BLM action closing wilderness study areas to vehicular use, while wilderness recreationists could not similarly challenge the agency's failure to take such steps even in the face of demonstrable degradation of the wilderness values of such areas. Such a "one-way ratchet" in favor of regulated parties would exacerbate the risks of "agency capture," since agencies could ignore without risk the views of persons unable to invoke judicial review. *See* discussion *supra*, at 11-12.

C. Recognition of the Court's Authority to Review an Agency's Failure to Act That Breaches a Statutory Duty Would Not Lead to Impermissible Judicial Interference in Agency Functions

BLM asserts that this Court must adopt its restrictive position in order to avoid "improper intrusion by courts into agency activities." Petitioners' Brief at 25. BLM

invokes a landscape in which federal judges, acting under the authority of § 706(1), micro-manage every aspect of an agency's conduct, instructing agencies in "how to act" rather than compelling agencies to act.

BLM's concern about the scope of potential remedies the courts might impose is unduly hyperbolic. In fact, the federal courts have extensive experience in adjudicating claims of agency action unlawfully withheld or unreasonably delayed, and have shown great sensitivity to agency autonomy in crafting remedies for such claims. The Court of Appeals for the D.C. Circuit, for example, the court with the most extensive involvement with administrative litigation, uses a "rule of reason" in determining when an agency action has been unreasonably delayed; the factors it weighs include the effect that expediting delayed action might have on agency activities of a higher or competing priority, as well as the nature and extent of interests prejudiced by the delay. *See, e.g., Telecommunications Research and Action Center v. FCC*, 750 F.2d 70, 80 (D.C. Cir. 1984) ("*TRAC*"). Other courts have shown similar sensitivity to agency functions in reviewing claims of agency failures to act. *See, e.g., N.A.A.C.P. v. Secretary of Housing and Urban Development*, 817 F.2d 149, 159-60 (1st Cir. 1987) (Breyer, J.) ("We do not see any reason why the court cannot effectively ensure HUD's future responsible exercise of discretion while at the same time preserving for the agency its discretionary options. . . . In formulating its remedy, of course, the district court may, as it has already done, seek the advice and participation of HUD."); *Estate of Smith v. Heckler*, 747 F.2d 583, 591 (10th Cir. 1984) (noting that the "court is not a 'super agency' and cannot control the specifics of how the Secretary satisfies [a statutory] duty").

Contrary to BLM's fears, the remedies entered by the courts in such cases have rarely gone beyond determining a schedule for completion of an agency's duty, *see, e.g., MCI Telecommunications Corp. v. FCC*, 627 F.2d 322 (D.C. Cir. 1980); *Public Citizen Health Research Group v. Chao*, 314 F.3d 143 (3d Cir. 2002), or retaining jurisdiction to supervise the agency's progress. *See, e.g., Air Line Pilots Ass'n v. CAB*, 750 F.2d 81, 87 (D.C. Cir. 1984). The court of appeals in the present case noted that "compelling agency action is distinct from ordering a particular outcome," Pet. App. 11a, and made clear that it was merely holding that plaintiffs' claims should be heard. Pet. App. 3a. Just as the equitable discretion of the federal courts can protect the legitimate sovereign interests of state officials subject to a federal consent decree, *see Frew v. Hawkins*, 124 S.Ct. 899, 905-06 (2004), so too the remedial discretion of the courts can prevent undue interference with federal agency functions.

In any event, BLM's concerns about the breadth of hypothetical remedies do not speak to whether federal courts possess *subject matter jurisdiction* under the APA to hear claims of agency failure to act. As the court of appeals noted, Pet. App. 14a, BLM confuses its claim of discretion over *how* to implement a statutory mandate with the actual question before this Court: whether the agency has discretion to disobey a mandatory statutory command altogether. To accord with the basic principles of the rule of law, that proposition must be rejected.

CONCLUSION

For these reasons, *amici* professors of administrative and/or environmental law urge this Court to affirm the decision of the court of appeals in this case.

Respectfully submitted,

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In The Supreme Court of the United States

GALE NORTON,
SECRETARY OF THE INTERIOR, ET AL.,

Petitioners,

v.

SOUTHERN UTAH WILDERNESS ALLIANCE, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF AMICUS CURIAE OF THE STATES OF CALIFORNIA, COLORADO, CONNECTICUT, ILLINOIS, MASSACHUSETTS, MISSOURI, MONTANA, NEVADA, NEW MEXICO, NEW YORK, OKLAHOMA, OREGON, SOUTH DAKOTA AND WISCONSIN IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED FOR REVIEW

Whether the federal courts have jurisdiction to enforce specific congressional mandates for the management of federal lands by the Bureau of Land Management, where a failure by the Bureau to carry out those mandates and its own land use plans threatens irretrievably to compromise the very values that Congress intended to protect.

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iv
INTEREST OF AMICI CURIAE	1
SUMMARY OF ARGUMENT	6
ARGUMENT	9
I. THE NON-IMPAIRMENT MANDATE IMPOSES ON BLM A MANDATORY, NONDISCRETIONARY DUTY, IN THE MANAGEMENT OF WILDERNESS STUDY AREAS, TO ENSURE AGAINST DEGRADATION OF THOSE AREAS PENDING DECISION BY CONGRESS; BLM'S FAILURE TO CARRY OUT THAT DUTY IS COGNIZABLE BY THE FEDERAL COURTS	9
A. Congress Adopted FLPMA Section 603 to Reserve for Itself the Opportunity to Designate Additional Wilderness Lands	11
B. Congress' Scheme Would Be Frustrated Were the Non-impairment Mandate Treated as less than a Mandatory, Nondiscretionary Duty That is Reviewable by the Federal Courts	13
1. Congress Did Not Delegate to BLM Discretion to Allow Impairment	15
2. Courts Have Long Understood That, with the Non-impairment Duty, Congress Intended BLM to Ensure Against Wilderness Degradation in the Management of WSA's Pending Congressional Disposition	17

TABLE OF CONTENTS – Continued

	Page
II. FEDERAL COURTS HAVE JURISDICTION TO REVIEW BLM'S NONCOMPLIANCE WITH THE MANDATORY, NONDISCRETIONARY TASKS IN THE BLM LAND USE PLANS	19
A. FLPMA and its Implementing Regulations Clearly Require Agencies to Comply with the Mandatory Elements of Land Use Plans	19
B. Land Use Plans Include Mandatory, Nondiscretionary Provisions; They are Not Always or Entirely General	20
C. Access to the Federal Courts Is Essential If States Are to Have Meaningful Recourse When Federal Agencies Neglect Their Obligations Respecting Land Management	23
III. THE FEDERAL COURTS HAVE JURISDICTION TO DETERMINE IF BLM HAS COMPLIED WITH NEPA'S "HARD LOOK" DOCTRINE IN UNFINISHED PROGRAMS, INCLUDING ONGOING PLANNING PROJECTS	25
CONCLUSION	28

TABLE OF AUTHORITIES

Page

UNITED STATES CONSTITUTION

U.S. Const., Art. IV, § 3, cl. 2 24

FEDERAL CASES

Abbott v. Gardner, 387 U.S. 136 (1967) 9, 10

Alaska Department of Environmental Conservation v. Environmental Protection Agency, 124 S.Ct. 983 (January 21, 2004) 25

Chevron v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 16, 19

Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971) 18

Granite Rock v. California Coastal Commission, 480 U.S. 572 (1987) 23, 24

I.N.S. v. Cardoza-Fonseca, 480 U.S. 421 (1987) 16

Kleppe v. New Mexico, 426 U.S. 529 (1976) 24

Marsh v. Oregon Natural Resources Commission, 490 U.S. 360 (1989) 26

Ohio Forestry Inc. v. Sierra Club, 523 U.S. 726 (1998) 21

Parker v. U. S., 448 F.2d 793 (10th Cir. 1971) 12, 17

Robertson v. Methow Valley, 490 U.S. 332 (1989) 26

Service v. Dulles, 354 U.S. 363 (1957) 19

Sierra Club v. Clark, 774 F.2d 1406 (9th Cir. 1985) 18

Sierra Club v. Hodel, 848 F.2d 1068 (10th Cir. 1988) 18

SUWA v. Babbitt, USDC, D. Utah, 2000 WL 33914094 14

TABLE OF AUTHORITIES – Continued

Page

SUWA v. Norton, 301 F.3d 1217 (10th Cir. 2002) 19, 21

Watt v. Alaska, 451 U.S. 259 (1981) 16

Webster v. Doe, 486 U.S. 592 (1988) 19

Whitman v. American Trucking Associations, 531 U.S. 457 (2001) 15, 17

FEDERAL STATUTES

5 U.S.C. § 551 10

5 U.S.C. § 701 9

5 U.S.C. § 706 10

16 U.S.C. § 1131 ..... 12, 13

16 U.S.C. § 1132 12

16 U.S.C. § 1275 12

16 U.S.C. § 1271 ..... 12, 13

16 U.S.C. § 1604 20

42 U.S.C. § 4321 4

42 U.S.C. § 4332 5

43 U.S.C. § 1701 ..... 2, 11

43 U.S.C. § 1712 ..... 3, 4, 22

43 U.S.C. § 1732 ..... 3, 19

43 U.S.C. § 1782 ..... 2, 11

FEDERAL REGULATIONS

43 C.F.R. § 1601.0-5 ..... 20, 21

43 C.F.R. § 1610.5-3 20

TABLE OF AUTHORITIES – Continued

Page

OTHER SUPPORT

Bureau of Land Management, *National Management Strategy for Motorized Off-Highway Vehicle Use on Public Lands* (2001) 27

California State Parks, *Taking the High Road, the Future of California's Off-Highway Vehicle Program* (2001) 27

General Accounting Office, *FEDERAL LANDS, Information on the Use and Impact of Off-Highway Vehicles*, 2-4 (1995) 27

George Coggins, *The Developing Law of Land Use Planning on the Federal Lands*, 61 U. Colo. L. Rev. 307 (1990) 20

Peter Lehner, *Judicial Review of Administrative Inaction*, 83 Colum. L. Rev. 627 (1983) 15

U.S. Census Bureau, *Statistical Abstract of the United States: 2003* 1

U.S. Department of Interior, *Interim Management Policy and Guidelines for Lands under Wilderness Review*, 44 Fed. Reg. 72014 (1979) 14, 15, 16

U.S. Department of Justice, *Presidential Authority over Wilderness Areas under the Federal Land Policy and Management Act of 1976*, 6 U.S. Op. Off. Legal Counsel 63 (1982) 6, 16

USDA, Forest Service, Pacific Southwest Branch, *National Forests and California's Water* 23

INTEREST OF AMICI CURIAE

The federal government is far and away the largest landowner in the nation. Of the roughly 2.27 billion acres of land in our nation, the federal government owns and controls approximately 674 million acres, or about twenty-nine percent. U.S. Census Bureau, *Statistical Abstract of the United States: 2003* 226 Table No. 360. In California, the federal government owns and controls forty-seven percent of the state's land. *Id.* Four other states – Alaska, Nevada, Utah and Idaho – have more than sixty percent of their land under federal control; while three more states – Arizona, Oregon and Wyoming – have more than forty percent of their land under federal control. *Id.* All States contain some federally owned land. *Id.* Moreover, the importance of individual federal holdings to the host states is often disproportionate to the holdings' size. National parks and national monuments, for example, are commonly signature features in a state's identity, while national forests, as well as public lands owned by the Bureau of Land Management ("BLM"), often provide the bulk of a state's natural resources and are central to the state's environmental and economic health.

Amici States have two sets of vital interests at stake in this litigation. First are the States' interests in the proper management of federal public lands. Two types of BLM land are at issue in this case, each of which is representative of lands owned and controlled by federal land agencies in general. Second are the States' interests in federal agencies' compliance with specific congressional mandates. In this litigation Plaintiffs seek to enforce BLM's duty to comply with three distinct statutory obligations, each protecting different interests.

The first category of BLM lands at issue in the case are the particularly precious and irreplaceable Wilderness Study Areas (WSA's), areas that are reasonably, sometimes almost completely, undisturbed and free of human alteration, lacking roads, mines, houses and other indicia of human presence, but abundant with wildlife, natural plant communities, open vistas, silence and solitude.[1] Congress directed BLM to identify these lands and protect their wilderness qualities until Congress decides whether to designate and protect them as permanent wilderness. Federal Land Policy and Management Act ("FLPMA"), section 603(a), 43 U.S.C. §§ 1701, 1782(a). Pending congressional action, WSA's are subject to what BLM refers to as FLPMA's "non-impairment mandate:" BLM must manage each WSA so it remains suitable for designation as permanent wilderness. *Id.* § 1782(c). The non-impairment mandate preserves the ability of Congress –

[1] The WSA's comprise huge segments of the lands of many of the States. Examples include:

In California:	631,848 acres of which the Secretary recommended 91,852 acres as suitable for wilderness designation.
In Colorado:	593,541 acres of which the Secretary recommended 242,915 acres as suitable for wilderness designation.
In Idaho:	1,327,641 acres of which the Secretary recommended 567,457 acres as suitable for wilderness designation.
In Nevada:	3,819,727 acres of which the Secretary recommended 1,390,662 acres as suitable for wilderness designation.
In Oregon:	2,641,365 acres of which the Secretary recommended 1,186,681 as suitable for wilderness designation.
In Utah:	3,226,266 of which the Secretary recommended 1,934,137 acres are recommended as suitable for wilderness designation.

Data from the Wilderness Society.

and the abilities of the States through their congressional delegations – to designate wilderness areas. In other words, at issue here is the States' interests in having wilderness protected within their borders. Although the WSA's at issue in this litigation are all under BLM control, similar issues could arise for WSA's under the control of other federal agencies or for rivers eligible for designation as wild and scenic.

The second category of lands at issue in this case includes essentially all land under BLM control. Congress, through FLPMA, directed BLM to prepare and follow land use plans for all land under BLM's control. 43 U.S.C. §§ 1712(a), 1732(a). The BLM lands and the governing land use plans are representative of most federal land in the nation, including lands managed by the Forest Service, the National Park Service and the Fish and Wildlife Service, in that each federal land agency must manage its land in accordance with land use plans that it prepares and adopts. These land use plans not only ensure that the agency will manage the land in a proper and thoughtful manner, they help protect the host states' interest in the lands, whether those interests be commercial, recreational or conservationist in nature. In FLPMA, Congress recognized the state interest in the management of federal land and directed BLM to coordinate its land use planning and management with the planning and management activities of state and local governments. 43 U.S.C. § 1712(c)(9). Further, to the extent that a state's direct sovereign powers may be impaired on federal land, that state has a particular interest in how the federal agency manages their lands.

Parallel to the types of land at issue in this litigation are the three congressional mandates involved. First is

BLM's "non-impairment duty" to manage each WSA so it remains suitable for designation as permanent wilderness. Plaintiffs allege that off-highway vehicle use on four specific WSA's is impairing the wilderness suitability of those WSA's and that BLM is thereby breaching the non-impairment mandate. In this litigation, because BLM has admitted impairment – the very outcome Congress sought to preclude – the States' interest in continued federal court jurisdiction does not turn on the ultimate merits of Plaintiffs' claim. Rather BLM's petition raises the possibility that states will not have redress to the federal courts even when a federal agency has admitted that it has not accomplished – and will not accomplish – a mandatory, non-discretionary duty.

The second duty at issue here is BLM's obligation (similar to that of the other federal land management agencies) to prepare and follow land use plans. 43 U.S.C. § 1712(a). Land use plans are the tool Congress has provided not only to manage the public lands, but also to protect the States' interests as neighbors and hosts to the federal lands. *Amici* States must be able to rely on these commitments when doing their own land use planning and resource allocation. And they must be able to seek the assistance of the federal courts to compel the federal land management agency to carry out the land use plans it has duly adopted. At issue in this case is not only the States' ability to protect their residents' interests in federal lands through the statutory federal land use planning process, but also the ability of the federal courts to protect the integrity of that process itself.

Third, in the National Environmental Policy Act ("NEPA," 42 U.S.C. § 4321 et seq.), Congress empowered

the federal courts to ensure that federal agencies are proceeding in a thoughtful manner and that the agencies at least consider environmental values in the decisions they make and the actions they take. 42 U.S.C. § 4332. State interests will be protected only if federal land agencies regularly determine if changed circumstances have rendered their land use plans out of date. Acceptance of BLM's position that it cannot be compelled even to take a hard look at whether changed circumstances have cause changed environmental consequences on environmentally priceless public lands, could result in closed, nonpublic decisions-by-default. The States cannot carry out their own land management responsibilities without the information that, through NEPA, Congress intended them to have, and that BLM would deny them. Again, at issue in this litigation is not only the states' ability to take advantage of an essential process, but also the ability of the courts to protect the integrity of that process itself.

The States thus have distinct interests in the proper management of wilderness-quality lands, such as BLM WSA's, and in the proper management of all federal public land, such as BLM lands in general. Similarly, the States have distinct interests in continued federal court jurisdiction over mandatory, non-discretionary duties such as the non-impairment duty, a federal agency's compliance with the agency's own regulations and binding plans, and federal agency compliance with procedural statutes such as NEPA.

If accepted by the Court, BLM's contention that the federal courts do not have jurisdiction over any part of this case would cause disturbing consequences for the States. BLM would have it that the federal courts, and therefore

the States, are powerless to compel that agency to manage wilderness study areas in a manner that prevents degradation of the very characteristics for which they were designated WSA's in the first instance. BLM would further have it that the federal courts have no jurisdiction to compel the BLM to comply with the land use plans it has adopted or to determine if those plans must be updated. BLM thus contends that its – and its sister agencies' – stewardship responsibilities over federal lands, including WSA's, are largely immune from judicial scrutiny.

BLM's contention is untenable and wholly dismissive of legitimate and substantial state interests in the preservation of these vital and irreplaceable resources.

SUMMARY OF ARGUMENT

In 1982, then Assistant Attorney General Theodore Olson with the Office of Legal Counsel, wrote "One of the express congressional purposes for the FLPMA was to reassert Congress' control over federal lands. . . ." *Presidential Authority over Wilderness Areas under the Federal Land Policy and Management Act of 1976,* 6 U.S. Op. Off. Legal Counsel 63, 71 (1982) (1982 WL 170671 (O.L.C.)). To assert that control, Congress established specific directives for federal land management, including the three statutory mandates at issue here.

Each of the three statutory duties involved in this case imposes specific requirements; contrary to BLM's arguments, none is a "general statutory standard." These statutory mandates are not ambiguous and do not grant to BLM the discretion to decline to follow them or to

implement them only in a limited, half-hearted manner. Nor, contrary to BLM's solipsistic arguments, does this case concern merely BLM's "day-to-day" management of federal lands, or purely discretionary BLM duties.

Rather, as the Tenth Circuit recognized and articulated, the complaint alleges that BLM has violated three separate non-discretionary statutory mandates by failing to implement and comply with those mandates at nine specific locations. The case is not before the Court on the merits; the petition here raises only the question of whether the federal courts have jurisdiction to review the particular failures to follow specific congressional mandates and BLM's own adopted and binding land use plans, and to order the required actions that explicitly appear in those statutes and plans.

Because the States' powers as independent sovereigns may be preempted on federal lands, it is of paramount importance to the States that the federal courts be available to protect any state interests that the States cannot directly protect themselves. *Amici* States believe that the federal courts do have, and always have had, jurisdiction to review federal agency action – and failure to take action – that defies clear statutory and regulatory standards. To rule otherwise would render this Court and the inferior federal courts powerless to enforce federal statutes in any instance where the federal agency could portray its noncompliance as an error of omission, rather than commission, and powerless to compel any federal agency act that was not on the short and crabbed list of formal agency actions, such as permits, sanctions, and rule-makings, that BLM presents. BLM Merits Brief at 13-14. This ruling would be improper in any context, it would be particularly so in the context of public lands where, because states may

not have their full sovereign powers, they must rely on BLM to protect their interests.

The federal courts have jurisdiction over each of three causes of action before the Court. First, federal courts have jurisdiction to hear Plaintiffs' claim that BLM is out of compliance with the non-impairment mandate for WSA's. They have this jurisdiction because Congress directly imposed on BLM a nondiscretionary duty to preserve WSA's from impairment. Even assuming, *arguendo*, that Congress left BLM discretion to select what actions to take to *prevent* impairment, Congress did not grant BLM discretion to *allow* impairment; BLM's duty to prevent impairment is mandatory, nondiscretionary, and directly imposed by Congress.

Second, BLM's duty to comply with its own duly adopted land use plans is a statutory and regulatory requirement; the FLPMA provisions concerning land use planning for federal lands, and BLM's own implementing regulations, both show that BLM is obliged to comply with commitments it makes in duly adopted land use plans. BLM's contention that the provisions of its land use plans are unenforceable simply has no support in the text of the statute and regulations.

Lastly, NEPA imposes procedural requirements that federal agencies must follow when they take actions that may harm the environment, procedural requirements over which the federal courts unquestionably have jurisdiction and that the federal courts routinely enforce. NEPA mandates that federal agencies take a "hard look" at changed circumstances affecting ongoing projects. In this instance and others, the parties may disagree about whether the mandate applies, but regardless of the

eventual disposition of the merits of the case, the federal courts have jurisdiction to make the determination.

The analysis of the Tenth Circuit was reasonable and correct. The judgment should be affirmed.

ARGUMENT

I. THE NON-IMPAIRMENT MANDATE IMPOSES ON BLM A MANDATORY, NON-DISCRETIONARY DUTY, IN THE MANAGEMENT OF WILDERNESS STUDY AREAS, TO ENSURE AGAINST DEGRADATION OF THOSE AREAS PENDING DECISION BY CONGRESS; BLM'S FAILURE TO CARRY OUT THAT DUTY IS COGNIZABLE BY THE FEDERAL COURTS.

The Court's observations in *Abbott v. Gardner*, about the Administrative Procedure Act, 5 U.S.C. § 701 ("APA") should guide the Court's review of BLM's arguments in this matter. *Abbott v. Gardner*, 387 U.S. 136 (1967). First, there is a "basic presumption of judicial review to one 'suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute,' so long as no statute precludes such relief or the action is not one committed by law to agency discretion." *Id.* at 140 (citations omitted). Second, "the cases dealing with judicial review of administrative actions have interpreted the 'finality' element *in a pragmatic way*." *Id.* at 149. (Emphasis added.) *Amici* States have a profound interest in the APA's guarantee of a public process and urge the Court to rule accordingly.

BLM argues that, under the APA, only discrete and final agency action may be reviewed by the federal courts. *Amici* States urge the Court to continue to interpret "finality" in the context presented here, in the "pragmatic way" endorsed by the Court in *Abbott*. Allowing a WSA to lose the very wilderness values that are required to support a designation as permanent wilderness *is* final action as to that Wilderness Study Area. The practical effect of BLM's proposed interpretation would be that a WSA could become disqualified for designation as wilderness even though there had been no formal agency action that BLM would recognize as "final" and reviewable. To deny jurisdiction until the threatened damage becomes permanent would be to render any subsequent judicial review of the alleged agency noncompliance an exercise in futility.

BLM argues that the federal courts' jurisdiction under APA section 706(1) is limited such that it allows a federal court to compel only those final agency actions that could be reviewed under section 706(2). BLM's position, echoed by amicus Pacific Legal Foundation, sharply contrasts with the *Abbott* presumption of reviewability. The argument, moreover, lacks support in the statute. First, the definition of "agency action" is expansive and open-ended. 5 U.S.C. § 551(13). The statute uses the wording "Agency action *includes*. . . ." indicating that the list is not a complete and exhaustive one. *Id.* Further "order," one of the types of agency action is itself defined expansively. *Id.* § 551(6). Second, "agency action" explicitly includes a "failure to act." *Id.* § 551(13). The illusory precision of BLM's proposed interpretation of "agency action" is inconsistent with the statute's very expansive definition of that term. To adopt BLM's proposed rule would enable

administrative agencies to ignore all but the most specific congressional mandates without fear of judicial review. Congress could exercise its Constitutional role only by designing statutes with long and detailed lists of tasks, deadlines, definitions, and other provisions to ensure that agency duties were completely spelled out and that all duties were formal and involved "final" action as BLM defines it. The rule BLM proposes would hamstring Congress and require it to perform detailed work that our system properly contemplates will be done by administrative agencies, subject to judicial review.

Of course, judicial review of agency inaction cannot be unbounded. Courts have subject matter jurisdiction only to review those agency duties that are both mandatory and nondiscretionary. Those are precisely the kind of duties that Plaintiffs allege were violated here.

A. Congress Adopted FLPMA Section 603 to Reserve for Itself the Opportunity to Designate Additional Wilderness Lands.

When Congress adopted FLPMA in 1976, it did so to reassert control of the nation's public land. Wilderness preservation was one of Congress' specific objectives, legislating that certain public lands should be "managed in a manner that . . . will preserve and protect [them] in their natural condition." 43 U.S.C. § 1701(a)(8). To that end, Congress retained for itself the task of evaluating *all* wilderness-suitable land in the nation and choosing which lands to designate as *wilderness*, 43 U.S.C. § 1782, thereby invoking the Wilderness Act's powerful and poetic conception that wilderness should "retain its primeval character and influence . . . affected primarily by the forces of nature [and offering] outstanding opportunities for solitude or a

primitive and unconfined type of recreation." 16 U.S.C. § 1131(c).

Recognizing the significance and enormity of the task it had set itself, Congress directed the President and the Secretary of the Interior to commence the multi-year, ongoing project of inventorying all of the nation's public lands and recommending to Congress which lands the President believes should be preserved as wilderness. Congress' extraordinary choice in 1976 to assign such substantial tasks to itself and to the President, without the option of delegating the choice of wilderness lands to any administrative agency, reflects the importance that Congress placed on our nation's remaining wilderness lands.

FLPMA, and the earlier Wilderness and Wild and Scenic Rivers Acts[2] reflect a fundamental determination by Congress, that certain natural resources – river, desert or forest – though not yet formally protected as wilderness or wild and scenic, are so precious that their federal agency stewards must watch over them and preserve their wildness until Congress, or in some instances a state legislature, can determine whether to afford them permanent protection. Congress recognized that in the normal course

[2] In FLPMA section 603, Congress built upon the inventory-and-designation approach it had taken in 1964 with the Wilderness Act. 16 U.S.C. § 1132. *See generally Parker v. U.S.*, 448 F.2d 793 (10th Cir. 1971), *cert. denied*, 405 U.S. 989 (1972). Congress also followed this approach with its determination in the Wild and Scenic Rivers Act that rivers which "possess outstandingly remarkable scenic, recreational, geologic, fish and wildlife, historic, cultural, or other similar values, shall be preserved in free-flowing condition, and that they and their immediate environments shall be protected for the benefit and enjoyment of present and future generations." 16 U.S.C. §§ 1271, 1275.

of development more and more of our remaining wild rivers and lands would become "trammeled by man" and permanently lose their "outstandingly remarkable values" or "primeval character and influence." 16 U.S.C. §§ 1131, 1271. Therefore, in *FLPMA* after keeping for itself the final decision as to whether eligible lands would be put in the Wilderness System, Congress commanded BLM to preserve Congress' prerogative by maintaining, until Congress acted, the suitability of the lands for preservation as wilderness.

Congress has made plain its intent that the federal agencies, including BLM, are truly only stewards as to these lands. They must maintain the wilderness values of the lands, and prevent any impairment of those values, until Congress itself makes the decision as to the ultimate fate of the WSA's. BLM here asks the Court to surrender the jurisdiction of the federal courts to enforce BLM's compliance with what Congress obviously thought was a vital duty. *Amici* States ask this Court to carry out the will of Congress, and ensure that appropriate judicial oversight of BLM action and inaction in performing its congressionally assigned duty remains available.

B. Congress' Scheme Would Be Frustrated Were the Non-impairment Mandate Treated as less than a Mandatory, Nondiscretionary Duty That is Reviewable by the Federal Courts.

BLM argues that its compliance or noncompliance with the non-impairment standard should be beyond judicial review because BLM has multiple options for complying with that standard. In other words, BLM contends, because (BLM alleges) some of the *remedies*

proposed by Plaintiffs might invade BLM's legitimate discretion, the district court does not have jurisdiction to entertain plaintiffs' complaint at all. Likewise, BLM contends that if it has taken *any* measures with the ostensible aim of preventing impairment of the WSA's, *all* judicial review is proscribed as an invasion of its discretion. BLM, in effect, argues that any evidence of efforts at compliance with congressional mandates completely ousts the federal courts of jurisdiction to compel full compliance. Rather than the old argument about whether the glass is half-full or half-empty, BLM argues that if there are even a few drops of water in the bottom of its glass, the federal courts are required as a matter of law to treat the glass as full.

Significantly, there is no dispute here that off-highway vehicle use impairs WSA's; BLM has long conceded that it can. *See, e.g.*, U.S. Department of Interior, *Interim Management Policy and Guidelines for Lands under Wilderness Review*, 44 Fed. Reg. 72014, 72015 (1979) [hereinafter "1979 Interim Management Policy"] ("Based on past practice, it is expected that ORV events involving cross-country travel (off existing ways and trails) as part of the route would rarely satisfy the non-impairment criteria.") More importantly, BLM has conceded in this very case that the off-highway vehicle use that Plaintiffs challenge *has* caused impairment. Memorandum Decision and Order, *SUWA v. Babbitt*, USDC, D. Utah, 2000 WL 33914094, *5 (December 12, 2000) ("The BLM points out that it is well aware that ORV-caused damage is resulting from cross-country travel in these WSA's. . . . It is also

clear that BLM is aware of the impairment caused by ORV use. . . .")

1. Congress Did Not Delegate to BLM Discretion to Allow Impairment.

BLM's arguments misconstrue the nature of the tasks delegated to it by Congress. "[T]he first step in assessing whether a statute delegates legislative power is to determine what authority the statute confers. . . ." *Whitman v. American Trucking Associations*, 531 U.S. 457, 464-65 (2001). Congress has directed BLM to prevent impairment of WSA's. BLM contends it has discretion to choose what actions to take to prevent impairment.[3] Even if that is so, Congress plainly did not delegate to BLM authority to determine whether to allow impairment. Peter Lehner, *Judicial Review of Administrative Inaction*, 83 Colum. L. Rev. 627, 665 (1983). Here, BLM has admitted that the wilderness values of the WSA's in question are being impaired – but argues that there can be no judicial determination of whether that impairment is permissible; BLM

[3] In 1979 BLM suggested something different; BLM effectively acknowledged that non-discretionary obligations are implicit in the non-impairment mandate, in other words, that the non-impairment mandate gives rise to subsidiary, nondiscretionary duties. BLM recognized that it could not comply with the non-impairment mandate without procedures to evaluate impacts, monitor impacts, and keep records of impacts. 1979 Interim Management Policy, *supra*, 44 Fed. Reg. at 72022-23.

thereby claims for itself authority whether or not to allow impairment.

BLM's current position is not entitled to "*Chevron*" deference, *Chevron v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984), because BLM here has reversed a long-standing policy of the agency, and has not done so in a rule-making context, or with appropriate procedures. "An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view." *I.N.S. v. Cardoza-Fonseca,* 480 U.S. 421, 446 n. 30 (1987); quoting *Watt v. Alaska,* 451 U.S. 259, 273 (1981).[4]

Indeed BLM's current position directly conflicts with past agency policy. In 1979, BLM recognized *in a rule-making* context that Congress had *not* delegated to BLM the discretion to allow impairment. The 1979 interim management policy repeatedly noted that BLM's obligation was to preserve the WSA inventory lands for Congress' evaluation: "The final decision on permanent wilderness designation for each wilderness study area belongs to Congress. Management under the non-impairment standard protects Congress' right to make the designation decision by preventing actions that would preempt that decision."[5] 1979 Interim Management Policy,

[4] On the other hand, BLM's view is now and has long been that off-road use can damage WSA and other public land.

[5] In 1982, the Department of Justice confirmed and reinforced BLM's view. *Presidential Authority over Wilderness Areas under the Federal Land Policy and Management Act of 1976,* 6 U.S. Op. Off. Legal Counsel 63 (1982), the Department's counsel concluded that even a

(Continued on following page)

supra, 44 Fed. Reg. at 72015-16 (1979). (The "non-impairment standard" is part of the means by which BLM complies with the non-impairment mandate. *Id.*)

2. Courts Have Long Understood That, with the Non-impairment Duty, Congress Intended BLM to Ensure Against Wilderness Degradation in the Management of WSA's Pending Congressional Disposition.

Given Congress' unmistakable determination to reserve for itself the choice of what lands to designate as wilderness, it is "implausible that Congress would [use] modest words" to delegate to BLM whether to allow impairment. *American Trucking Associations*, 531 U.S. at 468.[6] Until Congress decides what WSA's to designate as wilderness, the federal courts must be ready to determine if there has been impairment and if so order BLM to identify and implement appropriate remedial or preventative measures.

temporary setting-aside of the non-impairment mandate could defeat its purpose. " 'The interim management provision would be frustrated by irreversible disturbances of the status quo.' " *Id.* at 71 (quoting *Parker v. United States*, 448 F.2d 793, 797 (10th Cir. 1971), *cert. denied,* 405 U.S. 989 (1972)).

[6] *American Trucking Associations* is instructive here. The non-impairment mandate is undeniably a demanding goal. However, just as Congress can rationally choose to require air pollution control equipment "that might at the time appear to be economically or technologically infeasible," Congress can and did direct BLM to preserve WSA's to Congress' satisfaction. (*Id.* at 491-92) (citations and internal quotations omitted).

Indeed, as a practical matter, federal courts have repeatedly demonstrated that they can determine, in the context of particular actions for particular WSA's, whether BLM management of particular land meets the non-impairment standard, i.e., that the non-impairment mandate provides "a law to apply." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 413 (1971). In *Sierra Club v. Clark*, 774 F.2d 1406, 1408-09 (9th Cir. 1985), for example, the court of appeals did not question that it could readily interpret and apply the requirement from the Interim Management Policy that impacts from a permitted activity "be capable of being reclaimed to a condition substantially unnoticeable in the wilderness area . . . as a whole by the time the Secretary of the Interior is scheduled to send his recommendation to the President." *See also Sierra Club v. Hodel*, 848 F.2d 1068, 1076 (10th Cir. 1988), *overruled on other grounds*, *Village of Los Ranchos De Albuquerque v. Marsh*, 956 F.2d 970, 973 (10th Cir. 1992). ("The federal courts are capable of determining whether a WSA has remained 'roadless,' and whether the boundaries of public lands and rights-of-way will be breached. A court can measure whether the improvement of the Burr Trail will 'impair the suitability of [WSA's] for preservation as wilderness . . . .'")

II. FEDERAL COURTS HAVE JURISDICTION TO REVIEW BLM'S NONCOMPLIANCE WITH THE MANDATORY, NONDISCRETIONARY TASKS IN THE BLM LAND USE PLANS.

A. FLPMA and its Implementing Regulations Clearly Require Agencies to Comply with the Mandatory Elements of Land Use Plans.

An agency must obey the rules, regulations, guidelines, and plans that it itself adopts. *Service v. Dulles,* 354 U.S. 363, 372 (1957) (recognizing the right of federal courts to review an agency's actions to ensure that its own regulations have been followed); *Webster v. Doe,* 486 U.S. 592, 602, n.7 (1988). BLM argues, however, that a BLM land use plan can not be a source of mandatory, non-discretionary duties. Similarly Judge McKay, in his dissent below, concluded that BLM's land use plans are merely "aspirational." *SUWA v. Norton,* 301 F.3d 1217, 1245 (10th Cir. 2002) (J.McKay, dissenting in part).

These interpretations contradict the plain language of FLPMA: "The Secretary *shall* manage the public lands . . . in accordance with the land use plans developed by him under section 1712 [of FLPMA]." 43 U.S.C. § 1732(a) (emphasis added). This provision is not ambiguous or subject to multiple interpretations. *Chevron v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). FLPMA permits only one interpretation: provisions in land use plans that are presented as mandates are indeed mandatory, and give the agency only as much discretion as their wording allows.

BLM's own regulations compel the same conclusion. "Future resource management authorizations and actions," "budget or other action proposals," and "subsequent

more detailed or specific planning" must all "conform to the approved plan." 43 C.F.R. § 1610.5-3(a). The definition of "conformance" affirms that BLM's land use plans are binding on an action-specific level. "Conformance . . . means that a resource management action shall be specifically provided for in the plan, or if not specifically mentioned, shall be clearly consistent with the terms, conditions, and decisions of the approved plan or plan amendment." 43 C.F.R. § 1601.0-5(b).

B. Land Use Plans Include Mandatory, Non-discretionary Provisions; They are Not Always or Entirely General.

Federal land use planning is becoming "the most critical stage in the overall process for allocating public natural resources." *See, e.g.*, George Coggins, *The Developing Law of Land Use Planning on the Federal Lands*, 61 U. Colo. L. Rev. 307 (1990).[7] BLM's land use plans may contain *both* general descriptions of future planning efforts, which do not mandate specific tasks, *and* specific elements which do mandate specific tasks. Thus, a land use plan under FLPMA "is not a final implementation decision *on actions which require further specific plans,*

[7] At issue in this case are the land use plans that BLM adopts pursuant to FLPMA, known in BLM's regulations and actions as "Resource Management Plans." 43 C.F.R. § 1601.0-5(k). But, similarly, the National Forest Management Act of 1976 directs the Forest Service to develop and maintain "land and resource management plans," commonly known as forest plans, for the national forests. 16 U.S.C. § 1604(a). As BLM acknowledges in its brief, BLM's land use plans resemble forest plans. BLM Merits Brief, page 43.

process steps, or decisions under specific provisions of law and regulations." 43 C.F.R. 1601.0-5(k) (Emphasis Added). BLM quotes this regulation to the Court to argue that its land use plans can never be final implementation decisions, *see* BLM Merits Brief, pages 41-42, but the better reading of this regulation is that a BLM land use plan *is* a final implementation decision on those actions that do *not* require "further" plans, steps or decisions.

In practice, BLM plans often do mandate specific further actions.[8] The case at bar provides two neat examples of mandatory elements commonly contained in BLM land use plans: 1) a directive to monitor a particular area for off-road vehicle use; and 2) a commitment to create and implement an "ORV implementation plan." *SUWA v. Norton*, 301 F.3d at 1323-24. Each of these elements is an "agency action" for APA purposes, and would typically be included in a land use plan as a nondiscretionary duty. They should be held to be so here.

BLM argues that because it follows a tiered planning protocol, judicial authority to compel compliance with any of the individual tiers of its plans would unduly constrain the management flexibility it needs. This argument is a bald attempt to evade judicial review all together. The tiered planning approach that BLM has adopted is consistent with Congress' direction to BLM to "develop, maintain,

[8] In *Ohio Forestry Inc. v. Sierra Club*, 523 U.S. 726, 733 (1998), the Court ruled only that the particular forest plan provisions that the Sierra Club had challenged in the court below did not "command anyone to do anything or to refrain from doing anything." The Court never suggested plan provisions could not include specific commandments that could be enforceable or voidable. *See Id.* at 738.

and, when appropriate, revise land use plans which provide by tracts or areas for the use of the public lands." 43 U.S.C. § 1712(a). Yet that direction does not support BLM's extraordinary suggestion that each tier is pure "plan," all theoretical and with no commitment to action. This suggestion is not correct and should not be correct. Just as the most detailed, bottom-level plans will likely include general statements of future intention, a top level plan may include specific enforceable commitments to action. Congress has compelled BLM to adopt land use plans; *Amici* States urge the Court to rule that the federal courts have jurisdiction to compel BLM to comply with any definitive commitment in any of its land use plans. To rule otherwise would be to create an exception to the rule that an agency must follow its own plans and regulations.

Acceptance of BLM's construction of its obligation to comply with duties spelled out in land use plans would be tantamount to surrender of judicial authority to compel BLM to comply with the congressional mandate to follow a logical plan course. BLM, and perhaps other federal agencies, would be free to adopt plans that include specific commitments and promises without any fear that they could be held to those commitments and promises. If compliance by an agency with a plan that it has written and duly adopted with notice-and-comment procedures is made unreviewable and, therefore, unenforceable, the statutory provisions that the plan was mandated to carry out will be effectively written out of the law. Congress directed BLM to prepare and follow land use plans and any failure by BLM to do so is and should be reviewable by the federal courts.

C. Access to the Federal Courts Is Essential If States Are to Have Meaningful Recourse When Federal Agencies Neglect Their Obligations Respecting Land Management.

The proper management of federal land is of critical importance to the States' environmental and economic health. To give just one example, water, as is well-known, is the critical commodity in the West. The Forest Service has observed that, although twenty percent of the State of California is owned by the Forest Service, almost *half* of the rainfall that flows into California's rivers falls first onto national forest land. USDA, Forest Service, Pacific Southwest Branch, *National Forests and California's Water*. http://www.fs.fed.us/r5/publications/water_resources/ (last visited January 12, 2004). How the Forest Service manages those national forests has a very significant effect on the quality and availability of that run-off. In the words of the Forest Service: "Proper ecosystem management is essential for the health of our watersheds." *Id.* at "Forest Management." The management choices that the Forest Service makes through its planning process may have substantial implications for this vital source of water. Although California and the other States anticipate cooperative working relationships with the federal land agencies, and despite the importance of proper management of federal lands to the States, it has been suggested that the States and the federal agencies are not equal partners in that relationship. *See, e.g., Granite Rock v. California Coastal Commission*, 480 U.S. 572, 596 (1987) (Justice Powell, dissenting in part) ("Significantly, the FLPMA only requires the Secretary to listen to the States, not obey them.")

The Property Clause provides that "Congress shall have Power to dispose of and make all needful Rules and

Regulations respecting the Territory or other Property belonging to the United States." U.S. Const., Art. IV, § 3, cl. 2. "This Court has repeatedly observed that '[t]he power over the public land thus entrusted to Congress is without limitations.'" *Granite Rock v. California Coastal Commission*, 480 U.S. at 580. Though the Property Clause does not itself preempt state law on federal land, with the Supremacy Clause, it gives Congress plenary power to do so. When Congress enacts legislation respecting federal public lands, that legislation "'necessarily overrides conflicting state laws under the Supremacy Clause.'" *Id.* at 580-81 (quoting *Kleppe v. New Mexico*, 426 U.S. 529, 539, (1976)).

The actual scope of preemption of state authority on federal land depends on the particular provisions of the federal law and regulations in question. In *Granite Rock*, the Court held that the Forest Service regulations in question did not demonstrate "an intention to preempt all state regulation of unpatented mining claims in national forests." *Id.* at 584. The Court further assumed "*without deciding this issue* . . . that the combination of the [National Forest Management Act] and the FLPMA pre-empts the extension of state land use plans onto unpatented mining claims in national forest lands." *Id.* at 585. (Emphasis Added).

FLPMA does not preempt all state land use planning on BLM public lands. Nevertheless, it cannot be gainsaid that preemption is a possibility and that state sovereignty is thereby diminished on federal land. "[E]ven within the sphere of the Property Clause, state law is pre-empted only when it conflicts with the operation or objectives of federal law. . . ." *Id.* at 593. In those instances where states cannot exercise their own sovereign powers on federal

lands, the states must have recourse to the federal courts should a federal land use agency not comply with mandatory, non-discretionary provisions of its own plans or regulations. To return to the example of the national forests in California, through the forest planning process, the Forest Service makes important commitments about its land-use planning. Nevertheless, under BLM's proposed rule, were the Forest Service later to refuse to implement those commitments, California would have no recourse in the federal courts. In effect, California would be a "mere province[] or political corporation[], instead of a coequal sovereign[] entitled to the same dignity and respect." *Alaska Department of Environmental Conservation v. Environmental Protection Agency*, 124 S.Ct. 983 (January 21, 2004) (J. Kennedy dissenting).

III. THE FEDERAL COURTS HAVE JURISDICTION TO DETERMINE IF BLM HAS COMPLIED WITH NEPA'S "HARD LOOK" DOCTRINE IN UNFINISHED PROGRAMS, INCLUDING ONGOING PLANNING PROJECTS.

As is the case with respect to BLM's duty to comply with its own land use plans, the federal courts are also the States' only meaningful recourse should BLM fail to comply with its ongoing obligations under NEPA. If federal courts do not have such jurisdiction, BLM could change its land use plans, eliminate WSA protections, or refuse to update its plans regardless of on-the-ground changes that made the plans obsolete – all without NEPA compliance. Indeed, BLM could refuse even to examine evidence bearing on whether or not the plans need updating, regardless of changing circumstances. Not only does BLM need the information that a NEPA review provides, the

States need that information to perform their own planning and regulatory functions. *Robertson v. Methow Valley*, 490 U.S. 332, 349, 352 (1989).

BLM's duty to comply with NEPA's "hard look" requirement is related to, but distinct from, the other two duties discussed in this case. BLM must maintain land use plans both for Wilderness Study Areas and other lands under its control. In either case, changing circumstances may render a previous land use plan inadequate. *Amici* States agree with BLM that these federal land use plans are dynamic documents that must evolve as circumstances and BLM's knowledge changes. It is *because* the plans are dynamic and must change that NEPA continues to apply to BLM's planning process.

The case at bar demonstrates neatly why federal land agencies must update their plans in response to changed circumstances and why NEPA pertains to that obligation. Increasing off-highway vehicle use threatens the wilderness values and other natural values of Utah's public lands. BLM has many tools to reduce off-highway vehicle use and to mitigate the damage from that use. However, those tools cannot prevent or mitigate any damage unless BLM employs them, and BLM will not do so unless it is first aware of the increased need for those tools. The NEPA process provides the information to support such awareness.

In *Marsh v. Oregon Natural Resources Commission*, 490 U.S. 360, 370-71 (1989), this Court determined that the preparation of "postdecision supplemental environmental impact statements" is "at times necessary to satisfy [NEPA's] 'action-forcing' purpose." That rule applies in uncompleted projects such as ongoing planning projects.

As Senator Jackson noted, Congress intended NEPA to be "infused into the ongoing programs and actions of the Federal Government." (Quoted at *Id.* at 371, n.14.)

Just as there is no dispute that off-highway vehicle use can damage environmentally fragile land, so there is no dispute that the use of off-highway or off-road vehicles on public lands administered by BLM "has increased substantially in recent years." BLM, *National Management Strategy for Motorized Off-Highway Vehicle Use on Public Lands* (2001). A series of reports from the federal government has documented the damage that off-highway vehicle use causes on public lands. General Accounting Office, *FEDERAL LANDS, Information on the Use and Impact of Off-Highway Vehicles,* 2-4 (1995) and references cited therein. The increased use of off-highway vehicles and the damage to land, wildlife and other recreation opportunities caused by the increased use has led the Western States, as well as federal agencies, to adopt programs to regulate and restrict the use of ORVs. *See, e.g.*, California State Parks, Taking the High Road, the Future of California's Off-Highway Vehicle Program (2001). (http://ohv.parks.ca.gov/pages/1140/files/Taking%20the%20High%20Road.pdf, last visited February 4, 2004.)

It is important to clarify, as did the Tenth Circuit in its unanimous decision on this point, that Plaintiffs are not seeking to compel BLM to prepare a supplemental environmental impact statement. Rather, Plaintiffs seek only to compel BLM to "take a hard look at the proffered evidence."

CONCLUSION

Amici States respectfully urge the Court to affirm the judgment of the Tenth Circuit.

Respectfully submitted,

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IN THE

Supreme Court of the United States

GAIL NORTON, Secretary of the Interior, *et al.*,
Petitioners,

v.

SOUTHERN UTAH WILDERNESS ALLIANCE, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF *AMICUS CURIAE* OF MONTANA WILDERNESS ASSOCIATION IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED FOR REVIEW

Whether 5 U.S.C. §706(1), which provides subject matter jurisdiction "to compel agency inaction unlawfully withheld or unreasonably delayed," permits judicial review of an agency's failure to fulfill its unequivocal statutory mandate to preserve the wilderness character of federal lands.

TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES iv

INTEREST OF AMICUS CURIAE 1

STATEMENT 2

A. The Montana Wilderness Study Act 3

B. Montana Wilderness Study Areas 4

C. The Growing and Irreparable Impact of Off-Road Vehicles in WSAs 7

D. Procedural History of *Montana Wilderness Association, Inc. v. U.S. Forest Service* 16

SUMMARY OF THE ARGUMENT 20

ARGUMENT 20

Section 706(1) Gives the District Court Subject Matter Jurisdiction to Compel the Forest Service to Maintain the Presently Existing Wilderness Character and Potential of the Montana Wilderness Study Areas 20

A. Section 706(1) Expressly Creates Subject Matter Jurisdiction to Review an Agency's Final Failure to Act 21

B. The Forest Service's Failure to Maintain Presently Existing Wilderness Character and Wilderness Potential, Which Has Led Directly to Irreparable Harm, Is Final 23

C. Granting Injunctive Relief under §706(1) Would Not Intrude upon the Agency's Management Discretion 26

CONCLUSION 30

TABLE OF AUTHORITIES

Cases

Abbott Laboratories v. Gardner,
387 U.S. 136 (1967) 22, 24

Bennett v. Spear,
520 U.S. 154 (1997) 19, 24

Brock v. Pierce County,
476 U.S. 253 (1986) 25

Cobell v. Norton,
240 F.3d 1081 (D.C. Cir. 2001) 22

Lujan v. National Wildlife Federation,
497 U.S. 871 (1990) 19, 26-28

Montana Wilderness Association, Inc. v. U.S. Forest Service, 146 F. Supp. 2d 1118 (D. Mont. 2001) 14, 16-19, 25-27

Montana Wilderness Association, Inc. v. U.S. Forest Service, 314 F.3d 1146 (9th Cir. 2003) 19-20

ONRC Action v. Bureau of Land Management,
150 F.3d 1132 (9th Cir. 1998) 19

Shaughnessy v. Pedreiro,
349 U.S. 48 (1955) 22

Sierra Club v. Thomas,
828 F.2d 783 (D.C. Cir. 1987) 21, 25

Statutes

5 U.S.C. §551(13) 19, 21, 23

5 U.S.C. §704 23-24

5 U.S.C. §706(1) 18-21, 24, 28

5 U.S.C. §706(2) 14, 18-19, 22, 24, 29

16 U.S.C. §§1131-1136 3

§1131(c) 9

§1132(b) 3

16 U.S.C. §§1531-1544 5

43 U.S.C. §1701-1785 3

§1782(a) 4

§1782(c) 4

Pub. L. No. 88-577, 78 Stat. 891 (1964) 3

Pub. L. No. 93-632, 88 Stat. 2155 (1975) 3

Pub. L. No. 95-150, 91 Stat. 1243 (1977) 3, 4, 22, 28

Pub. L. No. 95-237, 92 Stat. 43 (1978) 3

Pub. L. No. 95-249, 92 Stat. 162 (1978) 3

Pub. L. No. 95-546, 92 Stat. 2062 (1978) 3

Pub. L. No. 98-140, 97 Stat. 901 (1983) 5

Regulations

36 C.F.R. pt 215 15

42 Fed. Reg. 2956 (Jan. 14, 1977) 9

55 Fed. Reg. 25,830 (June 25, 1990) 9

Miscellaneous

121 Cong. Rec. 1332 (Jan. 27, 1975) 5, 7

H.R. Rep. No. 620, 95th Cong., 1st Sess. (1977) 3, 6, 8

S. Rep. No. 163, 95th Cong., 1st Sess. (1977) 4-7

INTEREST OF AMICUS CURIAE

Montana Wilderness Association ("MWA")[1] was founded in 1958 to protect Montana's wilderness, wildlife habitat, and traditional recreational opportunities, such as back-packing, horse-packing, hunting, fishing, and wildlife appreciation. MWA's representatives frequently appear before Congress on a host of wilderness and forest management issues. MWA was instrumental in securing the passage of the federal Wilderness Act of 1964 and the Montana Wilderness Study Act of 1977. It played a major role in obtaining the wilderness designation of every such area in Montana, the wild and scenic designations of the Missouri and Flathead rivers, and the national monument status for the Upper Missouri River Breaks. MWA actively participates in local, state, and federal administrative proceedings affecting Montana's public lands, including Forest Service and Bureau of Land Management planning processes.

MWA has played a leading role in several cases concerning wilderness protection. *See, e.g., Montana Wilderness Association, Inc. v. U.S. Forest Service,* 655 F.2d 951 (9th Cir. 1981); *Montana Snowmobile Association v. Wildes*, 103 F. Supp. 2d 1239 (D. Mont. 2000) (as Defendant-Intervenor). Most recently, and of special significance here, MWA is the lead plaintiff in *Montana Wilderness Association, Inc. v. U.S. Forest Service*, 314 F.3d 1146 (9th Cir. 2003) (*MWA)*, which raises issues closely related to the issues before this Court in *Norton v. Southern Utah Wilderness Alliance (SUWA)*. Both cases focus on the availability of judicial review under 5 U.S.C. §706(1) to

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[1] Pursuant to Supreme Court Rule 37.6, Amicus Curiae Montana Wilderness Association affirms that no counsel for any party in this case authored this brief in whole or in part, and also affirms that no person or entity, other than Montana Wilderness Association, has made a monetary contribution to the preparation or submission of this brief.

challenge an agency's failure to take statutorily mandated action to protect the wilderness character of wilderness study areas. The Forest Service filed a petition for a writ of certiorari in the *MWA* case, which is being held pending the decision in *Norton v. SUWA*.

Amicus seeks to supplement the argument of Respondents Southern Utah Wilderness Alliance, *et al.*, by explaining, with reference to the Forest Service's obligations under the Montana Wilderness Study Act, that the District Court had subject matter jurisdiction under §706(1) to hear the suit, that the suit and resulting remedy did not intrude upon the agency's management discretion, and that absent judicial review the wilderness character of the wilderness study areas will be irreparably harmed.

Pursuant to Supreme Court Rule 37.3, written permission from all parties for MWA to file this brief has been lodged with the Clerk of the Court.

STATEMENT

When it enacted the Montana Wilderness Study Act of 1977, Congress directed the Forest Service to maintain the then-presently existing wilderness character and potential of several wilderness study areas in Montana. The record in *MWA v. U.S. Forest Service* demonstrates that the Forest Service has failed to maintain wilderness values associated with these unique and irreplaceable resources, thereby causing irreparable injury. The Bureau of Land Management ("BLM") contends that interested parties may not seek redress in district court for such injuries.

This Court should reject BLM's argument. Judicial review of an agency's failure to act, in violation of an express statutory mandate, is essential to ensure agency compliance with the statute. Barring judicial review would create a zone of agency immunity from its blatantly unlawful and irreparably harmful inaction. The Administrative Procedure Act expressly permits such suits, and such suits do

not intrude impermissibly upon the agency's expertise and management discretion.

A. The Montana Wilderness Study Act

Congress has long recognized the wilderness potential of the National Forests in the high mountains of Montana.[2] For example, when it enacted the Wilderness Act of 1964, 16 U.S.C. §§1131-1136, Congress designated several wilderness areas within National Forests in Montana.[3] Congress also instructed the Forest Service to review certain areas for possible designation as wilderness. 16 U.S.C. §1132(b). Completed in 1972, the Forest Service's review rejected nine areas in Montana, comprising 973,000 acres, for further wilderness study. H.R. Rep. No. 620, 95th Cong., 1st Sess. 2 (1977) ("House Report"). Congress subsequently enacted the Montana Wilderness Study Act of 1977 ("MWSA"), Pub. L. No. 95-150, 91 Stat. 1243 (1977), specifically listing those nine areas as wilderness study areas ("WSAs") and requiring the Forest Service to complete a study of each WSA and recommend whether to designate any as wilderness.[4]

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[2] The Montana high mountains were largely unsettled in the nineteenth century and consequently remained part of the public domain, first as Forest Reserves and later as part of the nation's first National Forests. Today, the U.S. Forest Service manages 16,893,000 acres in Montana.

[3] See Pub. L. No. 88-577, §3, 78 Stat. 891 (1964) (designating the Bob Marshall, Selway-Bitterroot, Cabinet Mountains, Gates of Mountains, and Anaconda-Pintler Wilderness Areas). In subsequent years, Congress designated other portions of Montana National Forests as wilderness areas. See Pub. L. No. 93-632, §2(d), 88 Stat. 2155 (1975) (Mission Mountains Wilderness); Pub. L. No. 95-237, §2(k), 92 Stat. 43 (1978) (Welcome Creek Wilderness); Pub. L. No. 95-249, 92 Stat. 162 (1978) (Absaroka-Beartooth Wilderness); Pub. L. No. 95-546, 92 Stat. 2062 (1978) (Great Bear Wilderness).

[4] Congress enacted the MWSA a year after it enacted the Federal Land Policy and Management Act ("FLPMA"), 43 U.S.C. §§1701-1785. Their substantive mandates for interim wilderness protection are slightly different. Unlike FLPMA, the MSWA directly designates certain

> Congress further directed that
>
> the wilderness study areas designated by this Act *shall*, until Congress determines otherwise, be administered by the Secretary of Agriculture so as to *maintain their presently existing wilderness character and potential for inclusion in the National Wilderness Preservation System*.

Pub. L. No. 95-150, §3, 91 Stat. 1244 (1977) (emphasis added). The Forest Service's twin duties—to "maintain their presently existing wilderness character" and to "maintain their . . . potential for inclusion in the National Wilderness Preservation Program"—reflected Congress' twin directives to ensure that recreationists could continue to enjoy these wild and primeval areas and to preserve Congress' option to designate them as wilderness. S. Rep. No. 163, 95th Cong., 1st Sess. 2 (1977) ("Senate Report").

B. Montana Wilderness Study Areas

Congress expressly proclaimed the importance of preserving the wilderness character of these WSAs. The 1977 Senate and House reports accompanying the bill documented and extolled the unique attributes and outstanding wilderness values making these WSAs worthy of congressional consideration as wilderness areas and necessitating interim protection until Congress acted. Today, the MWSA still protects the following seven WSAs:[5]

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wilderness study areas, Pub. L. No. 95-150 §2(a), whereas FLPMA gives the Bureau of Land Management the responsibility to designate wilderness study areas. 43 U.S.C. §1782(a). In addition, the MSWA requires the Secretary of Agriculture to "maintain their presently existing wilderness character and potential for inclusion in the National Wilderness Preservation System," Pub. L. No. 95-150, §3, 91 Stat. 1244, whereas FLPMA requires the Secretary of the Interior to manage the wilderness study areas "so as not to impair the suitability of such areas for preservation as wilderness." 43 U.S.C. §1782(c).

[5] In 1983, Congress designated large portions of the Taylor-Hilgard WSA as the Lee Metcalf Wilderness Area (named after one of the sponsors of

a. *Hyalite-Porcupine-Buffalo Horn (Hyalite)*. This WSA encompasses over 150,000 acres of the Gallatin Mountain Range. Bordering Yellowstone National Park and home to grizzlies, lynx, and wolves, all protected under the Endangered Species Act, 16 U.S.C. §§1531-1544, the Hyalite spans alpine meadows, pristine mountain lakes, and craggy peaks. It is "[a] magnificent mountainous area entirely without roads or other significant signs of man's work." 121 Cong. Rec. 1332 (Jan. 27, 1975). The 1977 Senate Report explained that "[l]arge numbers of elk, deer, moose, bighorn sheep, mountain goats, and grizzly bear and other wildlife migrate between Yellowstone Park and the proposed study area, often wintering in the Porcupine drainage and along the Gallatin River." Senate Report at 5. The Senate Report concluded that the WSA "is a major viewing area for millions of Park visitors. Each year, many thousands of hunters, fishing enthusiasts, sightseers, and other recreationists enjoy the wild Gallatin country of the Hyalite-Porcupine-Buffalo Horn." *Id.*

b. *West Pioneers*. Located in southwest Montana, the West Pioneers WSA comprises 150,000 acres of lakes and rolling, high-elevation forests, including the world's oldest living stand of lodgepole pines and alpine larch more than 700 years old. It is located in cowboy country, and has been used by outfitters for big game hunting and pack and saddle trips for decades. The WSA serves as the headwaters for "high quality blue ribbon trout streams of national significance. The endangered grayling and cutthroat trout

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the 1977 MWSA), and it released the remaining lands in that WSA for other uses. Pub. L. No. 98-140, §2, 97 Stat. 901 (1983). Congress also released the entire Mount Henry WSA for logging and other multiple uses. *Id.* §3. Although Congress passed a bill in 1988 designating wilderness in six of the seven remaining WSAs, the President pocket vetoed the bill, thereby leaving intact the Forest Service's statutory duty to "maintain their presently existing wilderness character and potential for inclusion in the National Wilderness Preservation System."

are indigenous to the natural streams and lakes of the West Pioneer area. Both vanishing species require essentially an undisturbed aquatic environment to survive. In addition, the area serves as important elk and moose summer range." Senate Report at 2-3; *see also* House Report at 5.

c. *Sapphires*. The Sapphires WSA spans the crest of the Sapphire Mountains in west-central Montana, bordering the Anaconda-Pintler Wilderness on the western slope of the Continental Divide. It links a string of wilderness areas, thereby providing a crucial corridor for wildlife. This WSA harbors large populations of big game and provides the headwaters for important trout streams. House Report at 7. "Some 1,000 elk and numerous moose inhabit the proposed study area. Also present are the rare lynx, pine marten, fisher, wolverine, and a remnant herd of bighorn sheep. All of the species depend largely on a wilderness environment for their survival." Senate Report at 4. The WSA is "heavily used by residents of Missoula and the Bitterroot Valley for wilderness camping, hunting, fishing, backpacking, horseback trips, sightseeing, and photography." *Id.*

d. *Ten Lakes*. Located along the Canadian border, the Ten Lakes WSA is a sub-alpine paradise of mountain lakes and coniferous forests. It "encompasses one of the two remaining grizzly bear habitats in the entire Kootenai National Forest. The endangered westslope cutthroat trout, as well as the Rocky Mountain whitefish, Dolly Varden, rainbow, and eastern brook trout, are found in the many beautiful natural lakes and streams of the area. Also present in the area are elk, moose, mountain lion, lynx, wolverine, deer, and black bear. All of these species except for deer and black bear require wild surroundings to survive." Senate Report at 4.

e. *Middle Fork Judith*. The Middle Fork Judith WSA lies east of the Continental Divide in an isolated range of

mountains rising from the Great Plains. The WSA "contains the beautiful and wild reaches of the Middle Fork and Lost Fork of the Judith River and a highly scenic canyon of 1,000-foot limestone cliffs. Over 1,000 elk rely on the proposed study area for spring, summer, and fall range. Spring use includes the critical elk calving period, during which time cow elk seek out remote, undisturbed areas. The Middle and Lost Forks represent the only significant undeveloped elk habitat left in national forest lands in central Montana." Senate Report at 4.

f. *Big Snowies*. The Big Snowies WSA is a unique "island" mountain range that rises abruptly from the surrounding Central Montana prairie. It is "one of extremely few potential wilderness areas in Central Montana—a region which presently is completely lacking in designated wilderness." 121 Cong. Rec. 1332 (Jan. 27, 1975). Mountain goats, elk, bears, and wolverines traverse deep canyons and expansive alpine meadows. The Senate Report noted that "[t]he primeval area is used for wilderness camping, hunting, hiking, horseback riding, and sightseeing as hundreds of Boy Scouts and other citizens use the area each year for wilderness purposes." Senate Report at 5.

g. *Blue Joint*. This WSA borders the Frank Church River of No Return Wilderness Area, part of the largest concentration of wilderness in the lower 48 states. The area provides excellent habitat for bighorn sheep, black bear, and elk, and "supplies ideal country for quality wilderness hunting, hiking and backpacking." Senate Report at 3. In 1977, the Blue Joint WSA had no development other than foot trails and one-half mile of unimproved road that was "rapidly converting to nature." *Id.*

C. The Growing and Irreparable Impact of Off-Road Vehicles in WSAs

When it enacted the MWSA, Congress recognized that a few off-road vehicles (ORVs) were used in some parts of

some WSAs (uses that would be prohibited in designated wilderness areas), House Report at 4-5, and the legislation permitted those pre-existing uses to continue as long as the Forest Service maintained the "presently existing" wilderness character of the WSAs. The record shows that ORV use was quite modest in 1977. Old jeep tracks reached a few scattered mining claims; trail bikes—two-wheeled motorcycles designed to handle mountain trails—used a few trails; and an extremely small number of snowmobiles operated in the WSA's. MWA's Supplemental Excerpts of Record, Ninth Circuit Nos. 01-35713, 01-35690 (hereafter "ER") 002, ¶7; ER 009, ¶¶3-5; ER 016, ¶¶2-3; ER 025, ¶¶2-3.

The limited scale of motorized use in 1977, in terms of the number of vehicles, their frequency of use, and their impact on wilderness values, underscores the fact that the WSAs were wild, primeval country, and explains why Congress directed the Forest Service to maintain their presently existing wilderness character and their potential for wilderness designation. Congress was prepared to accommodate some ORV use, but not at the expense of its twin directives to provide a genuine wilderness experience for traditional recreationalists and to preserve its option to designate these areas as wilderness.

ORV use and its impact on WSAs have grown rapidly and dramatically since the mid-1980s. Fueled by changes in ORV design, including especially increases in overall size and engine power, the rising popularity of ORVs among the general public has eroded the wilderness character of Montana WSAs and undermined their suitability for inclusion in the National Wilderness Preservation System. Because an area may be designated as wilderness only if it "retains its primeval character," appears to be shaped "primarily by the forces of nature with the imprint of man's work substantially unnoticeable," and "has outstanding

opportunities for solitude or a primitive and unconfined type of recreation," 16 U.S.C. §1131(c), increased ORV use not only threatens to take away wilderness values for recreationalists, but also to usurp Congress' prerogative to designate wilderness areas.

ORVs, including snowmobiles and four-wheeled all-terrain vehicles, have scarred the land, damaged habitat for endangered and other species, driven out game animals, injured indigenous vegetation and spread noxious weeds, and ruined the wilderness experience for back-packers, horse-packers, and campers. All-terrain vehicles have churned fragile mountain soils to create new paths to lakes and meadows and have widened many miles of pack and saddle trails. ER 046, ¶¶4, 5. The Forest Service not only has been aware of the growing use of ORVs and the resulting significant environmental impacts, it also allowed and encouraged this use.[6] ER 148 at 14-24. Under the guise of "trail maintenance," the Forest Service brought in trail-building machines to convert pack and saddle trails to all-terrain vehicle roads, and it allowed snowmobile groups to groom trails.[7] ER 064-66; 070-072; 076; 081.

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[6] For example, pack and saddle trails were not open to all-terrain vehicles because a federal regulation prohibited vehicles wider than 40 inches on any recreation trail (whether or not in a WSA). 42 Fed. Reg. 2956-59 (Jan. 14, 1977). The Forest Service changed the regulation in 1990 to give local foresters discretion to allow wider vehicles on trails. 55 Fed. Reg. 25,830 (June 25, 1990). Thereafter, all-terrain vehicles were permitted in WSAs, even though the Forest Service never made a formal decision to allow all-terrain vehicles on pack and saddle trails.

[7] The Forest Service fully understands that ORV use may damage wilderness character and may make an area unsuitable for wilderness designation. The Forest Service's Recreation Opportunity Spectrum Manual (ROSM), which delineates the basic framework for recreation management, recognizes that the physical presence of a road may be the determinant criterion in determining whether an area provides opportunities for "primitive recreation," as required by 16 U.S.C. §1131(c) for wilderness designation. ROSM included as Appendix C at

Increased ORV use since 1977 has caused significant, irreparable impacts in six of the remaining seven WSAs. Cowboy-outfitter Chris McNeil explained in his declaration: "[I]n 1970s the West Pioneers was ideal for a genuine wilderness pack trip. The occasional motorbike was not a big problem and there were no [all-terrain vehicles]. Now we face the possibility of being run out of business by an explosion of motorized use." ER 008. McNeil identified approximately 35 miles of trails in the West Pioneers WSA that had become roads for all-terrain vehicles. He explained that excessive motorized use has driven mountain goats from the area, and that "the once narrow unmaintained trail to Stone Lake has been churned into a small road by [all-terrain vehicles]," ruining the "once fantastic fishery" through overuse. ER 009. McNeil, who has used the West Pioneers WSA for his outfitting business for the past 25 years, estimated the number of motor vehicles on one trail, which had been widened to become an all-terrain vehicle "loop drive," had increased seven to ten times since 1977, and further observed that "much of the increase is from four-wheel all-terrain vehicles which were never on these trails in 1977." ER 009.

In the Sapphires WSA, the Forest Service expanded Trail 313 from a pack and saddle trail to a mini road traversing the WSA. ER 003-004, and accompanying photographs at ER 006-007. All-terrain vehicle use has proliferated since 1977, resulting in "extensive areas of erosive soils. . . . With continuous use by motorized recreational vehicles, I believe it doubtful these raw soil areas would ever be able to heal." ER 004 (Nicholls Decl.). The Forest Service also added a

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http://www.fs.fed.us/recreation/programs/beig/. Moreover, on January 7, 2004, the Forest Service Chief "identified unmanaged recreation, especially the undesirable impact from OHVs [off-highway vehicles], as one of the key threats facing the Nation's Forests and grasslands today." http://www.fs.fed.us/recreation/programs/ohv/External_Handout_1_7_04.pdf.

motorized loop trail, creating an all-terrain vehicle route to several mountain lakes, and even issued a permit allowing an outfitter to conduct motorized guided trips into this potential wilderness area, without public notice or evaluation of the permit's impacts on the WSA. Federal ER 45 (Civil Docket #26, 27, Intervenor declarations).

In the Hyalite WSA, outfitter Chuck Kendall described "2-track roads going through what used to be pristine meadows and untouched sidehills. . . . Where one [all-terrain vehicle] goes, they all go." ER 001. According to Kendall, the "impacts of the ORV use detracts from the wilderness characteristic of the area in that they are an ugly reminder of man's intrusion into a once pristine area," ER 001, and the damage done in 1996 (the year *MWA v. U.S. Forest Service* was filed) "was more extensive than I've ever seen." ER 001. Kendall, who has used the Hyalite WSA for over 30 years, reported that no all-terrain vehicles were present in the 1970s and 1980s, but that he is now threatened with losing his business because he can no longer provide his guests with a "quality backcountry experience." ER 001.

Franklin Culver, who has used the Hyalite for over 40 years, found the same problem in other areas of this expansive WSA. Attached to Culver's declaration are dozens of photographs depicting "damage to vegetation, soils and wetlands" caused by all-terrain vehicle use. ER 026. He also documented new permanent orange trail blazes, which mark user-created routes and encourage ORV users to leave designated routes. ER 028. Culver catalogued more than 30 trails in the WSA that allow all-terrain vehicles. Pls. Exhibit in Support of Summary Judgment, Docket Entry #69.

In 1990, against the advice of its own wildlife biologist, the Forest Service authorized a local snowmobile club to establish a new groomed snowmobile route into the Hyalite WSA in Rock Creek, a key wildlife area near Yellowstone

National Park. *Id.* Exh. 2M. The wildlife biologist had warned that establishing a new snowmobile route would "encourage or attract" increasing numbers of snowmobiles into an area where use previously had been "low," and that greater numbers of snowmobiles potentially would adversely affect grizzly bears, bighorn sheep, and other big game. *Id.* Exh. 2N.

Norm Newhall, who has hiked and camped in the Middle Fork Judith WSA for five decades, recalled that in the 1960s motorized use occurred only along a primitive jeep road leading to a private inholding in the WSA. ER 040-041. Beginning in the 1980s, however, "the number of roads proliferated significantly, thereby indicating a dramatic increase in the amount of vehicle use." ER 043. All-terrain vehicles using an old wagon/jeep road paralleling the Middle Fork of the Judith, a pristine trout stream, have created multiple stream crossings that have caused "significant damage from erosion." ER 044. Based on his intimate knowledge of the area and his repeated visits over five decades, Newhall concluded that ORV use has "increased dramatically in the last 20 years." ER 045.

The Ten Lakes Scenic Area, within the Ten Lakes WSA, was closed to motorized use in 1977 "to preserve the enjoyment of visitors whose recreation activities required the peace and quiet of the primitive forest." Admin. Rec. Vol. 4, Book 6, Doc. 78. The Forest Service, however, subsequently relaxed this restriction and entered into cooperative snow-grooming arrangements with the local snowmobile club. Snowmobilers cut a permanent mile-long swath through pristine forests within the WSA, which then became the primary access route for snowmobiles into the scenic area. ER 081-083. Snowmobile use is now heavy; 47 machines were counted entering the WSA on one winter morning. Pls. Exhibit in Support of Summary Judgment, Exh. 5C (Johnson Decl.) Mark Johnson, a local ski guide who held a Forest

Service Special Use permit, abandoned his back country ski-guiding business in the Ten Lakes WSA in part because the wilderness character his clients valued was compromised by excessive snowmobile use. *Id.*

In addition to scarring the land, ORVs adversely affect wilderness character and potential in other ways. By carrying seeds in their tire treads, all-terrain vehicles spread noxious weeds to remote areas. Noxious weeds, in turn, eradicate native vegetation that serves as forage for big game animals. Noxious weeds have infested hundreds of thousands of acres of Montana's backcountry, in part because of growing use of all-terrain vehicles.

Increased ORV use also contributes to the decline of important animal populations. Snowmobile use causes caused grizzly bears and wolverines to abandon their dens. ER 051-052 (Dr. Sara Jane Johnson Decl., citing Forest Service studies). All-terrain vehicles and snowmobiles displace elk, forcing them to seek other habitat. ER 050 (Dr. Sara Jane Johnson Decl.). Snowmobile-compacted trails harm lynx, an endangered species, by giving the lynx's competitors a means to traverse deep snow. www.fs.fed.us/r1/planning/lynx/reports/DEIS/Summary1.pdf *see also* 65 Fed. Reg. 16081 (Mar. 4, 2000) (rule listing lynx as endangered). Although Congress extolled the outstanding wildlife resources and undisturbed habitat found in the WSAs in 1977, and although the Forest Service's own scientists have shown that ORV use may adversely affect wildlife, the Forest Service never has measured how or to what extent burgeoning ORV use affects wildlife in Montana's WSAs.

Despite the undeniable link between increased ORV use and the degradation of wilderness values, the Forest Service has done little to maintain the wilderness character and potential of the WSAs. With the limited exception of an area closure order for the Hyalite WSA, issued after suit was

filed, the Forest Service has not acted to stop or even moderate the huge growth of ORV use, and in many cases it has taken steps, such as widening trails and building bridges, to facilitate that use.[8] Before this litigation, the Forest Service failed to evaluate the effects of ORVs on wilderness character (which would have allowed it to determine whether it was maintaining wilderness values), and failed to take any steps to maintain wilderness character and potential.[9] As the District Court noted, the Forest Service erroneously believed that it had no legal obligation to maintain wilderness character as it existed in 1977. *Montana Wilderness Association, Inc. v. U.S. Forest Service*, 146 F. Supp. 2d 1118, 1123 (D. Mont. 2001).

BLM hypothesizes that suits, such as *Norton v. SUWA* and *MWA v. U.S. Forest Service*, erode the administrative process by encouraging interested persons to go directly to court. BLM Br. 33-34. The record in the *MWA* case, however, reveals years of persistent requests to the Forest Service to fulfill its statutory duties to maintain the

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[8] The Forest Service took these steps under the guise of trail maintenance, thereby avoiding judicial review under §706(2). In another case, MWA challenged a change in trail restrictions permitting all-terrain vehicles to use pack and saddle trail in one national forest, but the District Court dismissed the case for lack of subject matter jurisdiction because the change was not a final agency action. *Montana Wilderness Association, Inc. v. U. S. Forest Service*, CV 00-199-M-DWM.

[9] In 2003, 26 years after the MWSA was passed, the Forest Service prepared a travel management plan (part of the relief sought in the lawsuit) for the Big Snowies WSA, and therein addressed for the first time the Forest Service's duties under the MWSA and the impacts of motorized use on wilderness character and potential. Big Snowies EA at http://www.fs.fed.us/r1/lewisclark/projects/bigsnowy/bigsnowy/htm. The travel management plan resulted in a number of steps to preserve the wilderness character of that WSA. MWA has not challenged the travel plan as arbitrary and capricious under §706(2).

"presently existing" wilderness character and wilderness potential of the WSAs.[10]

MWA's local chapters and individual members repeatedly voiced concerns about the degradation of wilderness values caused by increased ORV use in specific WSAs. Typical of these efforts is a 1994 letter by MWA member and past president Doris Milner to the Bitterroot National Forest about ORVs in the Sapphires WSA:

> As you know, the greater the number of users of wilderness [si dy] areas by motorized machines, the greater the threat to an area's wilderness quality. . . . I do not believe that it is the intent of the Bitter Root Forest to allow the use of motorized recreation machines to wear down the wilderness quality of the Sapphires, but on the other hand, neglect of this activity seems to indicate very little concern about the situation and the consequences if such activity is allowed to continue.

Admin. Rec. Vol. 3a, Book 5, Sec. 12, Doc. 67, p. 30. Ms. Milner asked the Forest Service to institute an "oversight program" to "monitor the pattern" of motorized use "both in summer and winter." The Forest Service, however, simply continued to build new all-terrain vehicle roads, widen existing roads, and authorize new snowmobile routes, all without assessing whether it was maintaining "presently existing" wilderness character and potential. MWA and co-plaintiff Friends of the Bitterroot wrote the Forest Service in 1992, 1993 and 1994 about snowmobile grooming, but the

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[10] Because the Forest Service never made a formal decision to increase ORV use, interested parties could not invoke the Forest Service's administrative appeal process. *See* 36 C.F.R. pt 215. Thus, the usual avenue for administrative review—the type of review process that occurs after the Forest Service has taken a final action, such as approving a timber sale or constructing a new trail—was not available. By failing to take final agency action, the Forest Service evaded the administrative review process.

Forest Service refused to analyze the effects of snowmobile grooming and increased snowmobile use. Admin. Rec. Vol. 3a, Book 5, Sec. 12, Doc. 67, pp. 1-4, 8-11, 13-15, 24-25, 29-30, 38. Ski guide Mark Johnson repeatedly pleaded with the Forest Service to maintain the wilderness character of the Ten Lakes WSA by curbing excessive snowmobile activity. ER 085. The Forest Service, however, entered into cooperative arrangements with a local snowmobile club to groom snowmobile routes leading into the WSA. Pls. Exhibit in Support of Summary Judgment Exh. 5C (Johnson Decl.).

D. Procedural History of *Montana Wilderness Association, Inc. v. U.S. Forest Service*

By the mid-1990s, ORV use, including use of all-terrain vehicles and snowmobiles, was significantly and permanently degrading the wilderness values of the WSAs. The Forest Service was not simply unresponsive to MWA's requests, it had abandoned its statutory duty to maintain the wilderness character and potential of the WSAs. As a result of the Forest Service's failure to act over many years, and in the face of degraded wilderness character and potential, MWA and two other grass-roots organizations filed suit in 1996 against the Forest Service.

The 11-count complaint alleged that the Forest Service failed to maintain the "presently existing" wilderness character and potential of six of the WSAs created in the Montana Wilderness Study Act.[11] All parties moved for summary judgment, which focused on three counts.[12] In

[11] Because MWA had no evidence of ORV damage in the Blue Joint WSA, it did not include that WSA in this suit.

[12] The District Court dismissed Counts IV, V, VII and VIII when it determined they were subsumed under Count I, dismissed Counts II, IX, and X for failure to exhaust administrative remedies, and held that Count XI was superfluous. *Montana Wilderness Association, Inc. v. U.S. Forest Service*, 146 F. Supp. 2d 1118, 1120 (D. Mont. 2001).

particular, MWA alleged that (a) in each WSA the Forest Service allowed "substantially increased motorized use," resulting in "increased environmental damage, disruption of wildlife and despoiling of aesthetic values" in violation of the congressional mandate to "maintain" the WSAs (Count I); (b) the Forest Service's "improvement of erosion bars and placement of new bridges and plastic culvert pipes has so improved trails" in the Hyalite-Porcupine-Buffalo Horn WSA as "to encourage motorized use and diminish the study area's wilderness characteristics and suitability for wilderness designation" (Count III); and (c) the Forest Service "dynamited boulders, placed crushed gravel, and constructed new trails" in the West Pioneers WSA, thereby "encouraging increased motorized use and compromising the wilderness quality of the area." (Count VI). *Montana Wilderness Association, Inc. v. U.S. Forest Service*, 146 F. Supp. 2d 1118, 1120 (D. Mont. 2001). With their cross motions for summary judgment, the Forest Service submitted a 47-volume administrative record and plaintiffs submitted 19 declarations and numerous exhibits from horse-packing outfitters, ranchers, wilderness guides, and long-time users of the WSAs, all attesting to the damage caused by ORVs since 1977.

The District Court held that the statutory language in the MWSA expressly created two separate duties for the Forest Service: (1) to "maintain" WSAs "presently existing wilderness character" and (2) to "maintain" their "potential for inclusion in the National Wilderness Preservation System." *Id.* at 1123. The District Court rejected as unreasonable the Forest Service's interpretation of the MWSA as requiring it only to maintain the WSAs for eventual congressional designation as wilderness. The Court concluded that the Forest Service's interpretation not only ignored statutory language requiring it to maintain the "presently existing character" of the WSAs, but also that the two obligations were not co-extensive. "[M]aintaining the

land's potential for designation as Wilderness does not necessarily ensure the maintenance of their 1977 'presently existing' wilderness character." *Id.*

The District Court then held that it had subject matter jurisdiction under 5 U.S.C. §706(1) to adjudicate Count I and granted plaintiff's motion for summary judgment. Because the Forest Service had misinterpreted the MWSA to require it to maintain the WSAs only for eventual wilderness designation, it "failed to consider whether, how, and to what extent its management decisions have impacted the wilderness character of the areas as they existed in 1977." *Id.* at 1126. Accordingly, the Court concluded that "the Forest Service has 'unlawfully withheld or unreasonably delayed' its maintenance of the Montana Wilderness Study Areas' 1977 wilderness character." *Id.* The District Court also held that it had subject matter jurisdiction under §706(2) to adjudicate Counts III and VI, which pertained to the Forest Service's actions in the Hyalite-Porcupine-Buffalo Horn and West Pioneers WSAs, and granted summary judgment on those counts as well. *Id.*

Before granting relief, the District Court expressly recognized the Forest Service's "unique expertise" to implement the MWSA. *Id.* at 1126. Its relief was correspondingly circumspect. It granted a declaratory judgment that the Forest Service had violated the MWSA "by failing to administer the Montana Wilderness Study Areas so as to maintain each area's wilderness character as it existed in 1977," *id.* at 1127, and, it enjoined the Forest Service "from taking any action" in the WSAs "that diminished the wilderness character of the area as it existed in 1977 or that diminished the area's potential for inclusion in the National Wilderness Preservation System" and to "take reasonable steps to restore the wilderness character of any [WSA] as it existed in 1977 if the area's wilderness character or its potential for inclusion in the National

Wilderness Preservation System has been diminished since 1977." *Id.* The Court carefully avoided intruding upon the Forest Service's day-to-day management of the WSAs.

The Forest Service appealed on the ground that the District Court lacked subject matter jurisdiction. Judge Trott, writing for a unanimous court, first held that the trail maintenance and improvement work in Counts III and VI did not constitute final agency action subject to review under §706(2). *Montana Wilderness Association, Inc. v. U.S. Forest Service*, 314 F.3d 1146, 1150 (9th Cir. 2003) (holding that routine maintenance work was not "final" action (citing *Bennett v. Spear*, 520 U.S. 154, 177 (1997)), and that trail maintenance does not fit into the statutorily defined categories for "agency action" (citing *Lujan v. National Wildlife Federation*, 497 U.S. 871, 899 (1990) and 5 U.S.C. §551(13)). Thus, it reversed the District Court judgment on Counts III and VI. Second, the Court of Appeals held that the District Court would have subject matter jurisdiction over Count I if plaintiffs made a showing of "'agency recalcitrance . . . in the face of clear statutory duty or . . . of such magnitude that it amounts to an abdication of statutory responsibility.'" 314 F.3d at 1150 (quoting *ONRC Action v. Bureau of Land Management*, 150 F.3d 1132, 1137 (9th Cir. 1998)). It rejected the Forest Service's argument that its statutory duties were discretionary, holding that the statutory duty to maintain the WSAs was a nondiscretionary, mandatory duty that the Forest Service could be compelled to carry out under §706(1). *Id.* at 1151 ("the Act does more than provide a mere policy statement or general guidance; it establishes a management directive requiring the Forest Service to administer the Study Areas to 'maintain' wilderness character and potential for inclusion in the Wilderness System"). The Ninth Circuit concluded, however, that because the Forest Service had presented some evidence that it had maintained the wilderness character of the WSAs, thereby creating a genuine issue of material fact,

summary judgment was inappropriate, and it remanded the case for trial. *Id.* at 1152.

SUMMARY OF THE ARGUMENT

The district courts in both *MWA v. U.S. Forest Service* and *Norton v. SUWA* had subject matter jurisdiction to hear claims that each agency's failure to act—failure to comply with express statutory duties to preserve wilderness values—was causing irreparable injury. Such suits are expressly permitted by §706(1) so long as the failure to act is final. In *MWA v. U.S. Forest Service,* the Forest Service not only failed to act for two decades, but even refused to acknowledge its statutory duty, thereby causing significant irreparable harm to unique resources of substantial public value. In these circumstances, the Forest Service's failure to act was final. Neither the litigation nor the District Court's carefully crafted remedy impermissibly intruded upon agency management discretion.

ARGUMENT

Section 706(1) Gives the District Court Subject Matter Jurisdiction to Compel the Forest Service to Maintain the Presently Existing Wilderness Character and Potential of the Montana Wilderness Study Areas

BLM asserts that a district court has no jurisdiction to review an agency's failure to act, even though the failure to act violates an express statutory mandate and causes irreparable harm to unique wilderness resources. BLM contends that the agency's failure to act is not final because the action to be compelled—maintaining presently existing wilderness character and potential—is not a "discrete" action, and because such suits would impermissibly intrude upon the agency's day-to-day management decisions. This argument should be rejected. The APA expressly permits such suits, the agency's failure to act in both *Norton v. SUWA* and *MWA v. U.S. Forest Service* is final, and a district

court's remedy need not (and in *MWA* does not) intrude upon the agency's management discretion.

A. Section 706(1) Expressly Creates Subject Matter Jurisdiction to Review an Agency's Final Failure to Act

The Administrative Procedure Act expressly permits judicial review of an agency's failure to act. It defines "agency action" as including "the whole or part of an agency rule, order, . . . or *failure to act*." 5 U.S.C. §551(13) (emphasis added). Thus, under the APA, agency inaction is a type of agency action. This definition is hardly surprising, for common experience teaches that the failure to make a decision is itself a decision that may have serious consequences. Of course, not all agency inaction is subject to review. Rather, the failure to act must be a "final agency action," *id.* §551(13), that is, a "final ['failure to act']." Further, the APA defines both the scope of judicial review of an alleged failure to act and the remedy: "The reviewing court shall—(1) compel agency action unlawfully withheld or unreasonably delayed." *Id.* §706(1). That is, a court faced with a claim of agency failure to act must determine whether the agency "unlawfully withheld or unreasonably delayed" action and whether that failure to act is final, and if so, the court must "compel" that action.

Implicit in §706(1) is the requirement that the agency have an unequivocal mandatory duty to act. *See Sierra Club v. Thomas*, 828 F.2d 783, 793 (D.C. Cir. 1987) (where "an agency is under an unequivocal statutory duty to act, failure so to act constitutes, in effect, an affirmative act that triggers 'final agency action' review"). The statutory duty must leave no doubt that the agency must act, even though the precise details of the agency's action—how it executes its duty—may be left to the agency's discretion.

The duty in *Norton v. SUWA*, as well as in *MWA v. U.S. Forest Service*, was unequivocal. For example, in the

Montana Wilderness Study Act, Congress decreed that the WSAs "*shall . . . be administered* by the Secretary of Agriculture so as to maintain their presently existing wilderness character and potential" for wilderness designation. Pub. L. No. 95-150, §3, 91 Stat. 1244 (emphasis added). The statute did not establish general goals for the Forest Service or merely authorize the agency to act at its own discretion. Rather, the Forest Service had continuing duties both to preserve the wilderness character of the WSAs, as it existed in 1977, and to preserve their potential for wilderness designation.

BLM's claim—namely, that judicial review is not available if the agency has discretion about how to carry out the action to be compelled—has no basis in the APA. As this Court has observed, Congress intended the APA be read broadly, and the APA's "'generous review provisions' must be given a 'hospitable' interpretation." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967) (quoting *Shaughnessy v. Pedreiro*, 349 U.S. 48, 51 (1955)). Judicial review of an agency's failure to act, in violation of an express statutory mandate, is essential to ensure agency compliance with the statute. Barring judicial review would create a zone of agency immunity from its blatantly unlawful and irreparably harmful inaction. *Cobell v. Norton,* 240 F.3d 1081, 1095 (D.C. Cir. 2001) (absent judicial review of action inaction, "agencies could effectively prevent judicial review of their policy determinations by simply refusing to take final action").[13]

[13] As noted in footnote 10, the Forest Service has studiously avoided making any decision that would be subject to the administrative review process or judicial review under §706(2).

B. The Forest Service's Failure to Maintain Presently Existing Wilderness Character and Wilderness Potential, Which Has Led Directly to Irreparable Harm, Is Final

BLM also maintains that BLM's inaction is not final agency action because the action withheld—preventing impairment of wilderness values—would not itself be a final agency action. BLM Br. 15-20. BLM's extreme position distorts the statutory language and serves no practical purpose other than to immunize unlawful agency inaction from review. Rather than eliminate an entire category of litigation brought to challenge statutory violations that cause irreparable harm, the Court should establish criteria to guide lower courts in determining whether the agency's failure to act may be deemed final.

The APA defines "failure to act" as a species of agency action, just as it defines a "rule" as a type of agency action. 5 U.S.C. §551(13). In both instances, only a *final* agency action—that is, only final failure to act or a final rule is reviewable. *Id.* §704. Nothing in the APA, however, supports BLM's position that §704 should be read to limit judicial review to a "final ['failure to act]" where the action to be compelled also is a final agency action. There is only one finality requirement in the APA, not two, and that requirement applies to the challenged agency action, in this case a "failure to act."

Concededly, deciding whether an agency's failure to act is final is not always as clear as when the agency takes a specific action, such as adopting a rule or establishing a final plan of action based on a record of decision. In some cases, such as the failure to issue a regulation by a statutory deadline, the finality is clear enough. In other cases, however, finality must be established by reference to pragmatic criteria derived from the purpose of the finality requirement.

The finality requirement in §704, like the ripeness doctrine, is designed to prevent premature judicial review of agency action or inaction. *Abbott Laboratories*, 387 U.S. at 148 (the "basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties"). In *Bennett v. Spear*, 520 U.S. 154 (1997), which involved a suit under §706(2), the Court stated:

> First, the action must mark the "consummation" of the agency's decisionmaking process—it must not be merely of a tentative or interlocutory nature. And second, the action must be one by which "rights or obligations have been determined," or from which "legal consequences will flow."

Id. at 177-78 (citations omitted). In the context of a §706(1) suit, these cases suggest that whether an agency's failure to act may be deemed final should depend on the degree to which the failure to act causes or imminently threatens to cause significant irreparable harm, and the extent to which the duration of the agency's failure to act demonstrates that as a practical matter the failure to act has reached the consummation of the agency's decisionmaking process. These considerations, which must be evaluated in the context of a particular case, play off each other. As the extent or significance of irreparable harm increases, the duration of the agency's inaction becomes less significant.

Modest, narrowly confined injuries, with little impact on the broader public may justify greater delay; failure to act in these circumstances may be more a matter of setting agency priorities than a final agency action. Similarly, if the agency has persuasively demonstrated that it intends to fulfill its

duties, and the harm from delay is limited, the failure to act may not be final agency action.

But where an agency's failure to act has caused or imminently threatens to cause significant, irreparable harm to unique resources of public significance (and thus to plaintiffs who enjoy these resources as Congress intended), an agency's failure to act should be deemed final based on a shorter period of inaction.

In two extreme circumstances, the length of inaction is irrelevant. First, where the agency has missed a statutory deadline, the failure to act is final. *Brock v. Pierce County*, 476 U.S. 253, 260 n.7 (1986). Second, where the agency denies that it has a mandatory duty or refuses to acknowledge its statutory obligation, the scales tilt conclusively to a determination that its failure to act is final. In taking such a position, the agency has signaled that it will never act. *See Sierra Club v. Thomas*, 828 F.2d at 793 (judicial review is appropriate in light of "agency recalcitrance . . . of such magnitude that it amounts to an abdication of statutory responsibility").

In *MWA v. U.S. Forest Service*, the agency's failure to act extended over two decades. MWA and other organizations and individuals repeatedly brought to the Forest Service's attention that rapidly growing ORV use was damaging wilderness values in the Montana WSAs, but the Forest Service refused to act and even facilitated greater ORV use. Moreover, the Forest Service took the position that it did not have a duty to maintain the "presently existing" wilderness character of the WSAs; its sole duty was the different and lesser obligation to ensure their potential for wilderness designation. 146 F. Supp. 2d at 1123.

Further, the record in *MWA v. U.S. Forest Service* illustrates how the Forest Service's failure to act has caused and continues to cause significant irreparable injury to the

wilderness character that existed in 1977 as well as to the potential for wilderness designation. The ever-increasing injury to the WSAs prevents recreationalists from enjoying the wilderness experience Congress intended to provide, and it threatens to eliminate Congress' option to designate these areas as wilderness. The agency's failure to act is particularly acute in cases, such as these, that are based on preservation statutes. Once a wilderness (or historic building, or endangered species, or anthropologically significant artifact) is significantly damaged, it no longer possesses the cultural, historical, scientific, and aesthetic value that Congress originally recognized in it and sought to protect. Areas where ORV use has scarred the land, spread noxious weeds, damaged critical habitat, and driven off endangered and other species cannot be brought back to its pristine condition, to its wild, primeval state, within the time-scale of human lifetimes, if at all.

These circumstances—the Forest Service's refusal to act over the course of two decades, irreparable injury to the wilderness values of the WSAs, and the agency's denial that it even has a duty—are more than enough to conclude that the Forest Service's failure to act was final.

C. Granting Injunctive Relief under §706(1) Would Not Intrude upon the Agency's Management Discretion

BLM expresses great alarm that allowing suits to compel compliance with an express statutory mandate, such as the duty to maintain the status quo in wilderness study areas, would impermissibly inject courts into agencies' "day-to-day" management decisions, and would permit "programmatic" review of agency policies. BLM Br. 17-18, 20, 30-35, 37-38 (citing *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990)). As illustrated by *MWA v. U.S. Forest Service*, BLM's position is wholly divorced from reality.

After finding that the Forest Service's failure to act violated its mandatory duty to maintain the presently existing wilderness character of the Montana WSAs and their potential for wilderness designation, the District Court issued a simple remedy. It granted a declaratory judgment that the Forest Service had violated the MWSA, 146 F. Supp. 2d at 1127, and it enjoined the Forest Service "from taking any action" in the WSAs "that diminished the wilderness character of the area as it existed in 1977 or that diminished the area's potential for inclusion in the National Wilderness Preservation System" and ordered the Forest Service to "take reasonable steps to restore the wilderness character of any [WSA] as it existed in 1977 if the area's wilderness character or its potential for inclusion in the National Wilderness Preservation System has been diminished since 1977." *Id.* In other words, it ordered the Forest Service to fulfill its statutory duty.

Nothing in the District Court's order specifies how the Forest Service must comply. The District Court did not specify a limit on the number of ORVs, instruct the Forest Service what trails, if any, to close to ORV use, or impose any other detailed requirement in which the Court substituted its judgment for that of the agency. On the contrary, the District Court carefully noted the Forest Service's "unique expertise" to implement the MWSA, *id.* at 1126, and issued a simple injunction requiring the Forest Service to begin obeying the law. The order deliberately leaves the Forest Service considerable discretion about a vast range of choices. The only limit—a limit imposed by Congress—is that the Forest Service's management, taken as a whole, must maintain the wilderness character of the WSAs and must maintain their potential for congressional designation as wilderness areas.

BLM's suggestion that this case is closely analogous to or even governed by *Lujan* is equally misplaced. In *Lujan*,

the Court was concerned that litigation would become another forum to debate and resolve broad policy issues, thereby impermissibly blurring executive and judicial functions. 497 U.S. at 891. Federal courts, it observed, could "intervene in the administration of the laws only when, and to the extent that, a specific 'final agency action' has an actual or immediately threatened effect." *Id.* at 894. Nothing of the sort occurred in *Norton v. SUWA* or *MWA v. U.S. Forest Service.* Faithfully adhering to *Lujan*'s holding that a nationwide program is not a final agency action, *id.* at 890, the plaintiffs in *MWA v. U.S. Forest Service*, just like the plaintiffs in *Norton v. SUWA*, challenged agency violations on specific parcels about which there was substantial, specific evidence that wilderness values were being irreparably harmed.[14] Nothing in this litigation seeks to challenge the Forest Service's nation-wide (or even region or state-wide) wilderness preservation policies or programs.

Finally, BLM insinuates that the Ninth Circuit's remand for a trial is further proof of the ill effects of §706(1) review. BLM Br. 32-33. It is important to bear in mind that the Forest Service requested the remand. Realizing that its interpretation of the MWSA—namely, that it had no duty to maintain the then-presently existing wilderness character of the WSAs—had no basis in the statute, and that the great bulk of the evidence showed that its failure to act was irreparably harming the WSAs' wilderness character, the Forest Service argued that it had submitted sufficient

[14] MWA's suit was not an across-the-board challenge to the Forest Service's management policies. On the contrary, the suit focused on WSAs whose boundaries Congress had carefully delineated on maps to include salient features befitting wilderness designation. Pub. L. No. 95-150, §2(a), 91 Stat. 1243-44. Moreover, although seven WSAs remain subject to the MWSA, the suit involves only six of them because there was no evidence of violation or injury affecting the Blue Joint WSA. Far from being a programmatic attack, MWA tailored the suit to the evidence of agency inaction and injury in individual areas.

evidence to create a genuine issue of material fact. The problem, if there is one, is of the Forest Service's own making.

More centrally, there is nothing remotely problematic about a trial on the question whether the Forest Service maintained the wilderness character and potential of the WSAs. Such an inquiry draws on the core competence of courts—to gather and evaluate facts in the context of concrete and narrowly drawn disputes and apply those facts to statutory standards. Most such cases would be decided on summary judgment, thereby precluding trial. But where there are genuine issues of material fact, a trial is the only mechanism to resolve those issues.[15] The potential risk of unwarranted judicial intrusion into agency discretion arises not in the trial, but when the court issues its remedy. But district courts have broad discretion to tailor relief both to hold an agency accountable to its statutory mandate and to defer to agency expertise about how to comply with that mandate. As the District Court's order in *MWA v. U.S. Forest Service* illustrates, courts can order compliance without issuing detailed remedial orders. The risk that some court, some day, may exceed these limits is no basis to preclude all cases where the agency's failure to act violates its statutory duty and meets the criteria for final action.

[15] A trial is not necessary where the agency takes an action subject to §706(2) review. In such a case, the agency would have created an administrative record subject to the standard of review in §706(2)(A). Here, however, the Forest Service steadfastly refused to take any action subject to §706(2) review and has not created a corresponding administrative record. A trial would permit the Forest Service, together with MWA, to create the necessary record.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the Court of Appeals.

DATED: February 17, 2004

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Supreme Court of the United States

GALE NORTON, SECRETARY OF THE INTERIOR, ET AL.,

Petitioners,

vs.

SOUTHERN UTAH WILDERNESS ALLIANCE, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF *AMICUS CURIAE* OF FORMER CHAIRS AND GENERAL COUNSELS OF THE COUNCIL ON ENVIRONMENTAL QUALITY IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

	Page
STATEMENT	1
INTEREST OF AMICI	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. THE EFFECTIVE IMPLEMENTATION OF NEPA REQUIRES THAT IT APPLY TO THE "ONGOING ACTIONS" OF THE FEDERAL GOVERNMENT	4
A. Congress Intended to Change Agency Priorities with Its Passage of NEPA	5
B. NEPA's "Action-Forcing" Devices Apply Broadly to the Actions – Including the Ongoing Actions – of the Federal Government	9
(1) Section 102(2)(E) Applies to Require Agencies to Examine Alternatives Even When the Environmental Impacts are Not Significant	10
(2) Section 102(1) Applies to Require Agencies to Administer Their Policies and Laws in Accordance With the Policies of NEPA	12
C. This Case Presents a Paradigmatic "Ongoing Action" For Which NEPA Requires Supplemental Analysis	14
D. Even If No Supplemental Analysis Were Required For the Entire Ongoing Action, NEPA Is Nevertheless Applicable For Other Reasons	22

TABLE OF CONTENTS – Continued

Page

(1) There Have Been "Actions" Involving Less Than the Entire Geographic Area At Issue Here That Clearly Implicate NEPA 22

(2) The Various Separate "Actions" Described in Section D(1) Above Could Constitute A "Program" Requiring Comprehensive Examination Under NEPA 24

(3) Section 102(1) Commands Agencies to Pay Heed to the National Environmental Policy 25

(4) CEQ's NEPA Regulations Treat "Inaction" Reviewable As "Action" Under the APA as "Action" for Purposes of NEPA's EIS Requirement 27

(5) The Government Concedes That Citizens Can Request Particular Actions from Agencies, Thereby Implicating NEPA 29

CONCLUSION 30

TABLE OF AUTHORITIES

Page

CASES

Andrus v. Sierra Club, 442 U.S. 347 (1979).... 2, 6, 9, 14, 15

Citizens against Burlington, Inc. v. Busey, 938 F.2d 190 (D.C. Cir. 1991) 17

Davis v. Mineta, 302 F.3d 1104 (10th Cir. 2002) 17

EDF v. Corps of Eng'rs, 492 F.2d 1123 (5th Cir. 1974) 13

Envtl. Def. Fund v. Tenn. Valley Auth., 468 F.2d 1164 (6th Cir. 1972) 13

Flint Ridge Dev. Co. v. Scenic Rivers Ass'n, 426 U.S. 776 (1976) 12, 13, 26, 27

Fund for Animals v. Norton, 294 F. Supp. 2d 92 (D.D.C. 2003) 20, 29

Kern v. U.S. Bureau of Land Mgmt., 284 F.3d 1062 (9th Cir. 2002) 11

Kleppe v. Sierra Club, 427 U.S. 390 (1976) 9, 14, 25

Louisiana v. Lee, 758 F.2d 1081 (5th Cir. 1985), *cert. den.*, 475 U.S. 1044 (1986) 22

Marsh v. Oregon Natural Res. Council, 490 U.S. 360 (1989) ..... *passim*

Mausolf v. Babbitt, 125 F.3d 661 (8th Cir. 1997) 20

Montgomery v. Ellis, 364 F. Supp. 517 (N.D. Ala. 1973) 13

Native Ecosystems Council v. Dombeck, 304 F.3d 886 (9th Cir. 2002) 11

Natural Res. Def. Council v. Sec. and Exch. Comm'n, 606 F.2d 1031 (D.C. Cir. 1979) 13

TABLE OF AUTHORITIES – Continued

Page

Northwest Motorcycle Ass'n v. U.S. Dep't of Agric., 18 F.3d 1468 (9th Cir. 1994) 20

Ohio Forestry Ass'n, Inc. v. Sierra Club, 523 U.S. 726 (1998) 24

Portland Audubon Soc'y v. Babbitt, 998 F.2d 705 (9th Cir. 1993) 27

Puerto Rico v. Muskie, 507 F. Supp. 1035 (D. P.R. 1981) 13

Ramsey v. Kantor, 96 F.3d 434 (9th Cir. 1996) 28

Robertson v. Methow Valley Citizens Council, 490 U.S. 332 (1979) 2, 9

Sierra Club v. Clark, 774 F.2d 1406 (9th Cir. 1985) 20

Sierra Club v. ICC, 1978 U.S. App. LEXIS 12538 (D.C. Cir. Feb. 21, 1978) 13

Sierra Club v. Marsh, 769 F.2d 868 (1st Cir. 1985) 17

Southern Utah Wilderness Alliance v. Babbitt, 2000 U.S. Dist. LEXIS 22170 (D. Utah Dec. 22, 2000) 18

Southern Utah Wilderness Alliance v. Norton, 301 F.3d 1217 (10th Cir. 2002) 5, 18, 19, 28

Strycker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223 (1980) 10

STATUTES AND REGULATIONS

16 U.S.C.

§ 6511(7)(C) 2

§ 6514(c)(1)(C)(ii) 2

TABLE OF AUTHORITIES – Continued

Page

42 U.S.C.

§ 4331 ..... 5, 12

§ 4331(b) 7

§ 4332 5

§ 4332(1) 12

§ 4332(2) 5

§ 4332(2)(C) 9

§ 4332(2)(C)(iii) 11

§ 4332(2)(E) 10, 11, 26

§ 4335 6

§§ 4341 *et seq.* 1

§§ 4371 *et seq.* 1

40 C.F.R. Parts 1500-1508 2

§ 1500.1(a) 5, 6

§ 1500.1(c) 7

§ 1500.4 ..... 7, 8, 14

§ 1500.4(i) 8

§ 1500.5 ..... 7, 8, 14

§ 1502.4 ..... 8, 14, 25

§ 1502.4(d) 14

§ 1502.7 11

§ 1502.9(c) 16, 21

§ 1502.9(c)(1)(ii) 9, 15

§ 1502.20 ..... 8, 25

TABLE OF AUTHORITIES – Continued

Page

§ 1502.21 8
§ 1506.3 8
§ 1507.3(b)(2)(ii) 8
§ 1508.4 ..... 8, 9
§ 1508.9 10
§ 1508.9(a) 11
§ 1508.9(b) 11
§ 1508.18 ..... 27, 28
§ 1508.18(b) 14
§ 1508.18(b)(3) 24
§ 1508.23 25
§ 1508.28 8

LEGISLATIVE MATERIALS

115 CONG. REC. 26571 (1969) 6
115 CONG. REC. 39702 (1969) 13
115 CONG. REC. 39703 (1969) 26, 27
115 CONG. REC. 40416 (1969) 5, 6, 12
115 CONG. REC. 40418 (1969) 26, 27
115 CONG. REC. 40419 (1969) 12
115 CONG. REC. 40925 (1969) 13
115 CONG. REC. 40926-27 (1969) 13
H.R. REP. NO. 91-378 (1969) 6, 7

TABLE OF AUTHORITIES – Continued

Page

H.R. REP. NO. 91-765 (1969) 6
S. REP. NO. 91-296 (1969) 6, 7, 9, 15

MISCELLANEOUS

Exec. Order 11644, 37 Fed. Reg. 2877 (Feb. 9, 1972), *reprinted as amended in* 42 U.S.C.A. § 4321 21
Exec. Order 11989, 42 Fed. Reg. 26959 (May 25, 1977) 21
63 Fed. Reg. 110 (Jan. 2, 1998) 23
65 Fed. Reg. 15169-70 (March 21, 2000) 20
65 Fed. Reg. 19921 (Apr. 13, 2000) 23
66 Fed. Reg. 6659-6661 (Jan. 22, 2001) 23
CEQ, *Considering Cumulative Effects Under the National Environmental Policy Act* (Jan. 1997) 11
CEQ, *Environmental Quality* 1972 21
CEQ, *Environmental Quality* 1977 21
CEQ, *Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations*, 46 Fed. Reg. 18026 (Mar. 23, 1981), as amended by 51 Fed. Reg. 15618 (Apr. 25, 1986) 11, 17
L. Caldwell, *Science and the National Environmental Policy Act* (1982) 12
Environmental Assessment (January 21, 2002), available at http://www.ut.blm.gov/sanrafaelohv/ea/ea1contents.htm 24
Yost, *Streamlining NEPA – An Environmental Success Story*, 9 B.C. Envtl. Aff. L. Rev. 507 (1982) 2

TABLE OF AUTHORITIES – Continued

Page

516 DM 6, Appendix 5.4 (Department of Interior, Department Manual)..... 8

5 Weekly Comp. Pres. Doc. 11 (Jan. 5, 1970)..... 7

STATEMENT

Every surviving former Chair of the Council on Environmental Quality (CEQ) and every surviving former General Counsel of CEQ submits this *amicus* brief in support of respondents' claims arising under the National Environmental Policy Act (NEPA), urging this Court to affirm the unanimous decision of the Tenth Circuit on those claims. This brief is confined to the NEPA issues and does not address other issues before the Court. It is submitted upon the blanket consents of counsel for petitioners and respondents, filed with the Court.

INTEREST OF *AMICI* [1]

This brief is submitted on behalf of former Chairs and General Counsels of the Council on Environmental Quality in the Executive Office of the President[2] whose service extends back to the enactment of NEPA and the creation of the CEQ during the Nixon Administration. The CEQ Chairs joining in this brief include Russell Train (Nixon Administration), Russell Peterson (Nixon and Ford Administrations), John Busterud (Ford Administration), Charles Warren (Carter Administration), J. Gustave Speth (Carter Administration), Michael Deland (first Bush Administration), Kathleen McGinty (Clinton Administration), and George Frampton (Clinton Administration). The

[1] Pursuant to this Court's Rule 37.6, *amici* state that no counsel for any party in this case authored this brief in whole or in part, and no person or entity other than *amici* and their counsel has made a monetary contribution to the preparation and submission of this brief.

[2] *See* 42 U.S.C. §§ 4341 *et seq.*, 4371 *et seq.* (establishing CEQ).

CEQ General Counsels joining in the brief include Gary Widman (Nixon and Ford Administrations), Nicholas C. Yost (Carter Administration), and Nancy Nord (Reagan Administration). Each of them retains an interest in the proper and effective implementation and interpretation of the Act. Counsel of Record, General Counsel of the CEQ during the Carter Administration, was lead draftsperson of the Council's Regulations implementing the National Environmental Policy Act of 1969 (40 C.F.R. Parts 1500-1508), which this Court has consistently held are entitled to substantial deference.[3] Co-counsel was his predecessor as General Counsel, who advised the CEQ concerning the Guidelines which preceded the Regulations.

SUMMARY OF ARGUMENT

This Court most properly held in *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 371 (1989), that it would be "incongruous" if blinders to adverse environmental effects, once removed, were restored "prior to the

[3] *Andrus v. Sierra Club*, 442 U.S. 347, 358 (1979) ("CEQ's interpretation of NEPA is entitled to substantial deference"); *see also Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 355-56 (1979) (same); *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 372 (1989) (same). The CEQ's NEPA Regulations, derived in part from its earlier Guidelines, have remained in effect from the Administration of President Jimmy Carter through that of President George W. Bush with only one intervening amendment to one section. *See* Yost, *Streamlining NEPA – An Environmental Success Story*, 9 B.C. Envtl.Aff.L. Rev. 507 (1982). (Congress has also implicitly approved the importance of the CEQ regulations as recently as 2003. In its recently enacted legislation, for instance, Congress specifically incorporated portions of the CEQ NEPA regulations. *See, e.g.*, 16 U.S.C. § 6511(7)(C); 16 U.S.C. § 6514(c)(1)(C)(ii).)

completion of agency action simply because the relevant proposal has received initial approvals." Many "actions" taken by federal agencies are not discrete, one-time events, but rather represent "ongoing actions" to which continuing NEPA obligations must attach for the Act's purpose to be realized. In addition, the information and circumstances set out may significantly change during the pendency of an ongoing action, such as during implementation of a plan. *Amici* urge this Court to reiterate and reinforce its commitment to the application of NEPA to the ongoing actions of the Federal Government.

In applying NEPA to ongoing actions of federal agencies, at least three of NEPA's "action-forcing" devices are potentially applicable – section 102(2)(C)'s Environmental Impact Statement (EIS) requirement (with its significance threshold), section 102(2)(E)'s Environmental Assessment (EA) requirement (which has no such threshold), and section 102(1)'s requirement for agencies to act in accordance with the policies set out in NEPA (also with no significance threshold).

Amici respectfully suggest that this case presents the very paradigm of when NEPA's requirement for a Supplemental Environmental Impact Statement (SEIS) applies to Bureau of Land Management's (BLM) ongoing actions with respect to Wilderness Study Areas (WSAs), when there exists new information of significant new environmental impact, and when the action has not been concluded by a decision one way or the other as to permanent wilderness designation. At minimum, NEPA's independent and "action-forcing" requirement for an EA applies, which has a lower threshold than does an EIS (and the analysis in which may or may not lead to an EIS). Additionally and alternatively, there have in this case been "actions" subject

to NEPA covering less than the entire geographic area that is the focus of this case which are themselves subject to NEPA. It may be that they collectively result in cumulative impacts requiring a program EIS. The additional "action-forcing" requirement for federal agencies to administer their policies and laws in accordance with the congressional policies set out in NEPA should guide the BLM.

ARGUMENT

I. THE EFFECTIVE IMPLEMENTATION OF NEPA REQUIRES THAT IT APPLY TO THE "ONGOING ACTIONS" OF THE FEDERAL GOVERNMENT

In its most recent decision involving NEPA this Court stated:

> The subject of postdecision supplemental environmental impact statements is not expressly addressed in NEPA. Preparation of such statements, however, is at times necessary to satisfy the Act's "action-forcing" purpose. . . . It would be incongruous with this approach to environmental protection, and with the Act's manifest concern with preventing uninformed action, for the blinders to adverse environmental effects, once unequivocally removed, to be restored prior to the completion of agency action simply because the relevant proposal has received initial approval. As we explained in *TVA v. Hill*, although "it would make sense to hold NEPA inapplicable at some point in the life of a project, because the agency would no longer have a meaningful opportunity to weigh the benefits of the project versus the detrimental effects on the environment," up to that point, "NEPA cases have generally required agencies to file environmental impact statements when the remaining governmental action would be environmentally "significant."

Marsh, 490 U.S. at 371 (internal citation omitted). The Court's instruction retains its wisdom and controls the NEPA issues before the Court. While the Court of Appeals for the Tenth Circuit was divided on the APA issues, it ruled unanimously for Respondents on the NEPA issue. *Southern Utah Wilderness Alliance v. Norton*, 301 F.3d 1217 (10th Cir. 2002).

A. Congress Intended to Change Agency Priorities with Its Passage of NEPA

The former CEQ officials joining in this brief, concerned for the continuing integrity – and indeed vitality – of NEPA, respectfully submit this *amicus* brief to give voice to that concern and to assist the Court in addressing the important NEPA issues before it. NEPA is, in the words of the CEQ Regulations, "our basic national charter for protection of the environment." 40 C.F.R. § 1500.1(a). It establishes policy (42 U.S.C. § 4331 (§ 101)), and provides means (42 U.S.C. § 4332 (§ 102)), for carrying out that policy.[4] To that end, section 102 (42 U.S.C. § 4332, contains

[4] "The basic principle of this policy," said Senator Henry Jackson, NEPA's Senate author, "is that we must strive in all that we do, to achieve a standard of excellence in man's relationship to his physical surroundings." 115 CONG. REC. 40416 (1969) (Statement of Sen. Jackson). Senator Jackson recognized, however, that "a statement of environmental policy is more than a statement of what we believe . . . it provides a statutory foundation . . . for guidance in making decisions which find environmental values in conflict with other values." *Id.* "[W]e must consider the natural environment as a whole and assess its

(Continued on following page)

"action-forcing" provisions to ensure that federal agencies act according to the letter and spirit of the statute. *See* 40 C.F.R. § 1500.1(a); S. REP. NO. 91-296, at 19 (1969); *Andrus v. Sierra Club*, 442 U.S. 347, 350 (1979). By its own terms NEPA supplements the policies and goals set forth in the existing authorizations of federal agencies. 42 U.S.C. § 4335 (§ 105).

In enacting NEPA, Congress fully appreciated the significance of what it was doing and of the impact the enactment would have on the operations of the Federal Government. The Act was "the most important and far-reaching environmental and conservation measure ever enacted," said its lead author in the Senate, Henry Jackson. 115 CONG. REC. 40416 (1969) (Statement of Sen. Jackson). "It is the unanimous view" of the members of the Senate Committee that reported out NEPA, "that our Nation's present state of knowledge, our established public policies, and our existing governmental institutions are not adequate to deal with the growing environmental problems and crises the Nation faces." S. REP. NO. 91-296 at 4 (1969).[5] The Committee found that such conditions presented "a serious threat to the Nation's life support system." *Id.* at 13. Indeed, "[t]he Nation has in many areas overdrawn its bank account in life-sustaining natural

quality continuously . . . " stated NEPA's House author, Representative John Dingell. 115 CONG. REC. 26571 (1969) (Statement of Rep. Dingell).

[5] There exist both a Senate Report and a House Report (H.R. REP. NO. 91-378, pts. 1 & 2 (1969)) concerning NEPA, along with a Conference Report employed by the House Managers to explain the conferees' changes to the bill. H.R. REP. NO. 91-765 (1969). Since the "action-forcing" provisions of NEPA originated in the Senate, their legislative history is reflected in the Senate Report (and to a lesser extent the Conference Report) but not in the House Report.

elements." *Id.* at 16. In the Committee's words, "[i]mportant decisions concerning the use and the shape of man's future environment continue to be made in small but steady increments which perpetuate rather than avoid the recognized mistakes of previous decades." *Id.* at 5. The House was no less committed to action and to change. "There may be controversy as to how close to the brink we stand," states the House Report, "but there is none that we are in serious trouble." H.R. REP. NO. 91-378 at 4 (1969).

NEPA's impact was equally clear to the President. When signing the bill into law on January 1, 1970, President Nixon emphasized the boldness of the bill by declaring it "particularly fitting that my first official act of this new decade is to approve the National Environmental Policy Act." 5 Weekly Comp. Pres. Doc. 11 (Jan. 5, 1970).

While NEPA establishes an environmental policy for the Nation, the Act, by its terms, recognizes full well that agencies are required to balance legitimate, and sometimes competing, values that have been given Constitutional or statutory national priority. The Act instructs agencies to use all practical means, "consistent with other essential considerations of national policy," to implement the policies set out in the statute. 42 U.S.C. § 4331(b) (§ 101(b)). The CEQ itself has been fully aware of and has acted to recognize such other competing essential considerations of national policy. For instance, the CEQ NEPA Regulations themselves set out 17 measures that agencies are bound to follow to reduce paperwork (40 C.F.R. § 1500.4) and 12 such measures to reduce delay (40 C.F.R. § 1500.5). "NEPA's purpose," after all, "is not to generate paperwork – even excellent paperwork – but to foster excellent action." 40 C.F.R. § 1500.1(c).

In submitting this brief, the former CEQ officials recognize the legitimacy of the Government's concern that courts not become officious intermeddlers in the environmentally benign day-to-day routines of government.[6] That said, *amici* strongly urge this Court to continue to recognize, as it did in *Marsh*, 490 U.S. at 1371-1374, that federal "actions" are often not one-shot events, but rather are ongoing actions, and that NEPA's obligations are not terminated by a past decision, in those cases where the actions are continuing and where environmental impacts exceed earlier projections. An agency's consideration of later-arising circumstances or information regarding the environmental impacts of its actions, while those actions remain ongoing, is essential to fulfilling NEPA's goal of environmentally-informed decisionmaking. Compliance with those continuing obligations need not unduly burden agencies because they can use efficient approaches to analyze the effects of new information (40 C.F.R. §§ 1500.4 and 1500.5) and can use the various devices available (*see, e.g.*, 40 C.F.R. §§ 1502.20 and 1508.28 (tiering), 1502.21 (incorporation by reference), 1506.3 (adoption), 1500.4(i), 1502.4 and 1502.20 (program documents)) to tier from an earlier document and to focus discussion on the extent to which the new information adds to or changes impacts

[6] Indeed, the CEQ NEPA Regulations require that each agency adopt as part of its implementing procedures "categorical exclusions" whereby categories of actions that do not either individually or cumulatively have significant environmental impacts are identified and excluded from any further examination under NEPA (meaning neither an EA nor an EIS is required). 40 C.F.R. § 1508.4; *see also* 40 C.F.R. § 1507.3(b)(2)(ii). (BLM's procedures have no categorical exclusion for increased ORV use. 516 DM 6, Appendix 5.4 (Department of Interior, Department Manual)).

analyzed earlier. With specific regard to a SEIS requirement (discussed in section I(C) of this brief, *infra*.), it must be kept in mind that not all new information will trigger an SEIS, only "significant new circumstances or information. . . ." 40 C.F.R. § 1502.9(c)(1)(ii). In addition, the ability to use "categorical exclusions" to remove from NEPA's applicability actions that can have no environmental impacts, affords agencies the opportunity to exclude from further study entire categories of environmentally benign activities. 40 C.F.R. § 1508.4; *see also* footnote 6, *supra*.

B. NEPA's "Action-Forcing" Devices Apply Broadly to the Actions – Including the Ongoing Actions – of the Federal Government

As its congressional authors instructed, and as this Court has noted on numerous occasions, NEPA created "action-forcing" procedures to help ensure that its environmental policies are implemented. S. REP. NO. 91-296 at 9; *Kleppe v. Sierra Club*, 427 U.S. 390, 409 (1976); *Andrus*, 442 U.S. at 350; *Marsh*, 490 U.S. at 372; *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 369 (1979).

The Government's brief has devoted special attention to one of those action-forcing devices, the EIS, (42 U.S.C. § 4332(2)(C) (§ 102(2)(C))). Brief for Petitioners (Pet. Brief) at 11, 36-38. (In its Appendix, for instance, it quotes section 102(2)(C), but does not include section 102(2)(E), which provides a separate action-forcing provision.) The EIS, with its statutory threshold of "major federal action significantly affecting the quality of the human environment," is perhaps the most publicized of the action-forcing devices, but it is not the only one. For purposes of this case, at least two other such devices are relevant, namely, sections 102(2)(E) (requiring the examination of alternatives) and

102(1) (requiring adherence to NEPA's policies). Both these sections of the statute, discussed below, are relevant to the Court's disposition of the NEPA issues in this case.

(1) Section 102(2)(E) Applies to Require Agencies to Examine Alternatives Even When the Environmental Impacts are Not Significant.

The provision requiring an EA, section 102(2)(E) (42 U.S.C. § 4332(2)(E)), applies far more broadly than does that for an EIS, that is, it has a much lower threshold of applicability.[7] *See* 40 C.F.R. § 1508.9.[8] In its totality, the pertinent subsection reads: "[A]ll agencies of the Federal Government shall – . . . (E) Study, develop, and describe appropriate alternatives to recommended courses of action in

[7] The Court, in reviewing the adequacy of an EA, has had occasion to note the distinction between an EA and an EIS. *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 225 (1980).

[8] The section of the CEQ NEPA Regulations defining "Environmental Assessment," 40 C.F.R. § 1508.9, reads as follows:

> Environmental assessment:
>
> (a) Means a concise public document for which a Federal agency is responsible that serves to:
>
> (1) Briefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact.
>
> (2) Aid an agency's compliance with the Act when no environmental impact statement is necessary.
>
> (3) Facilitate preparation of a statement when one is necessary.
>
> (b) Shall include brief discussions of the need for the proposal, of alternatives as required by section 102(2)(E), of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted.

any proposal which involves unresolved conflicts concerning alternative uses of available resources; . . . "[9] 42 U.S.C. § 4332(2)(E).

In brief, the congressionally imposed duty to develop and to evaluate alternatives is not confined to those instances where there may be "significant" impacts (the EIS threshold), but is far broader (with a lower threshold and a corresponding diminution in the documentation required).[10] Indeed, to take note of the actual practice of agencies throughout the government, the CEQ reports that in a given year approximately 450 EISs are prepared (both draft EISs and final EISs, so approximately 225 actual actions would be involved), while 45,000 EAs are prepared. *See* CEQ, *Considering Cumulative Effects Under the National Environmental Policy Act* at 4, Jan. 1997 (also available at http://ceq.eh.doe.gov/nepa/ccenepa/ccenepa.htm); *see also Kern v. U.S. Bureau of Land Mgmt.*, 284 F.3d 1062, 1076 (9th Cir. 2002) (noting that in a typical year 45,000 EAs are prepared compared to 450 EISs); *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 896 (9th Cir. 2002) (same).

[9] 42 U.S.C. § 4332(2)(C)(iii) (§ 102(2)(C)(iii)), and 42 U.S.C. § 4332(2)(E) (§ 102(2)(E)), are the two sections of NEPA that independently impose obligations to study alternatives in the context of an EIS and an EA respectively.

[10] An EIS is expected to total fewer than 150 pages (300 for unusually complex proposals), (40 C.F.R. § 1502.7), while an EA is a "concise" document, (40 C.F.R. § 1508.9(a)), which contains "brief discussions" (40 C.F.R. § 1508.9(b)). CEQ recommends that EAs not exceed approximately 10 to 15 pages. CEQ, *Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations*, Q. 36a, 46 Fed. Reg. 18026, 18037 (Mar. 23, 1981), as amended by 51 Fed. Reg. 15618 (Apr. 25, 1986).

In short, a significance threshold does not apply for an EA (but does apply for an EIS).

(2) Section 102(1) Applies to Require Agencies to Administer Their Policies and Laws in Accordance With the Policies of NEPA.

Section 102(1) of NEPA provides, "[t]he Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administrated in accordance with the policies set forth in this Act, . . ." 42 U.S.C. § 4332(1) (§ 102(1)).[11] (These policies are set forth in NEPA section 101 (42 U.S.C. § 4331).)[12]

While describing the outcome of the House-Senate conference on NEPA, Senator Henry Jackson listed section 102(1) among the legislation's action-forcing procedures. 115 CONG. REC. 40416 (1969) (Statement of Sen. Jackson). Similarly, in an exhibit summarizing the key provisions of the Act, he noted that section 102(1) was among "the action-forcing procedures which will help insure that the policies enunciated in section 101 are implemented." *Id.* at 40419. The version of NEPA originally passed by the

[11] This Court had occasion to address the "fullest extent possible" language, which is common to 102(1) and 102(2), in *Flint Ridge Dev. Co. v. Scenic Rivers Ass'n*, 426 U.S. 776, 787-88 (1976). The Court quoted the legislative history and concluded that the phrase is a "deliberate command that the duty NEPA imposes . . . not be shunted aside in the bureaucratic shuffle." *Id.* The Court also observed that "NEPA's instruction that all federal agencies comply with . . . § 102 to the fullest extent possible is neither accidental nor hyperbolic." *Id.*

[12] The linkage between mandatory procedure and substantive policy criteria has been aptly described "the genius of NEPA." L. Caldwell, *Science and the National Environmental Policy Act*, at 74 (1982).

House of Representatives did not contain any action-forcing provisions. *See* 115 CONG. REC. 39702 (1969) (Statement of Rep. Dingell) (noting that the House bill contained no provisions comparable to section 102). It is worth noting, however, that the House conferees shared Jackson's view of the role of section 102(1). *See, e.g.*, 115 CONG. REC. 40925 (1969) (Statement of Rep. Mailliard) (characterizing section 102(1) as positive direction to agencies); *id.* at 40926-27 (Statement of Rep. Aspinall) (section 102(1) "tells the agencies to follow" environmental policy).

The actions required by section 102(1) have yet to be fully defined. The section has not received extensive judicial attention. *But see Flint Ridge Dev. Co. v. Scenic Rivers Ass'n*, 426 U.S. 776, 787-88 (1976) (interpreting "fullest extent"); *Natural Res. Def. Council v. Sec. and Exch. Comm'n*, 606 F.2d 1031, 1044-49 (D.C. Cir. 1979) (discussing agency requirements under section 102(1)). Those courts that have addressed the issue have focused on two features of section 102(1). First, it makes environmental policy a part of every agency's mandate. *See, e.g.*, *Natural Res. Def. Council*, 606 F. 2d at 1044; *Envtl. Def. Fund v. Tenn. Valley Auth.*, 468 F.2d 1164, 1175-76 (6th Cir. 1972). Second, it requires agencies to comply fully with that mandate. *See, e.g., Sierra Club v. ICC*, 1978 U.S. App. LEXIS 12538 (D.C. Cir. Feb. 21, 1978); *EDF v. Corps of Eng'rs*, 492 F.2d 1123 (5th Cir. 1974); *Envtl. Def. Fund*, 468 F.2d at 1175-76. Significantly, that requirement is not limited to the EIS process. *Natural Res. Def. Council*, 606 F. 2d at 1048-49; *see also Puerto Rico v. Muskie*, 507 F. Supp. 1035, 1055-56 (D. P.R. 1981); *Montgomery v. Ellis*, 364 F. Supp. 517, 533-34 (N.D. Ala. 1973). In other words, agencies must fully comply with NEPA's section 102(1) even when there is no major federal action significantly affecting the quality of the human environment.

C. This Case Presents a Paradigmatic "Ongoing Action" For Which NEPA Requires Supplemental Analysis

As noted above, this Court has most appropriately declared that it would be "incongruous" if blinders to adverse environmental effects, once removed, were restored "prior to the completion of agency action simply because the relevant proposal has received initial approvals." *Marsh*, 490 U.S. at 371. The very paradigm of such an ongoing action is presently before the Court. While some actions, in the nature of "projects," such as dams or highways, are finite, and once built, are complete, other forms of actions, such as programs or plans, may be ongoing and involve less truncated NEPA obligations.[13] Some involve ongoing actions to which, in this Court's

[13] As the Court noted in *Andrus*, 442 U.S. at 363 n.20, the CEQ Regulations provide that "actions tend to fall within" one of several categories, including projects (such as dams or highways), programs (such as the situation described by this Court in *Kleppe v. Sierra Club*, 427 U.S. 390, 410 (1976), where multiple proposals with cumulative or synergistic effects must be considered together), policies (such as regulations adopted pursuant to the APA), or plans (such as those which guide or prescribe alternative uses of federal resources). 40 C.F.R. § 1508.18(b); *see also* 40 C.F.R. § 1502.4. As this Court has said, "[i]f environmental concerns are not interwoven with the fabric of agency planning, the action-forcing characteristics of § 102(2)(C) would be lost." *Andrus*, 442 U.S. at 350-51. In applying NEPA to such ongoing actions, CEQ has been acutely sensitive to the need for limits to ensure that while environmental impacts are being considered, their evaluation does not unduly delay the ongoing activities of government. In structuring their NEPA processes agencies are directed, therefore, to employ scoping and tiering and the other methods set out in §§ 1500.4 and 1500.5 to relate broad and narrow actions and to "avoid duplication and delay." 40 C.F.R. § 1502.4(d); and *see* page 8, *supra*, (discussing tiering, and other tools designed to ease NEPA's implementation).

words, NEPA obligations continue to apply "when the remaining governmental action would be environmentally 'significant.'" *Marsh*, 490 U.S. at 371, *quoting Tennessee Valley Authority v. Hill*, 437 U.S. 153, n.34 (1978). The Court, in *Andrus*, 442 U.S. at 363, n.22, most appropriately quoted the Senate Report to conclude that "Major Federal actions 'include the expansion or revision of ongoing programs.'"[14] That Report continued to assert that "[t]he policies and goals set forth in section 101 can be implemented if they are incorporated into the ongoing activities of the Federal Government in carrying out its other responsibilities to the public." S. REP. NO. 91-296 at 19 (1969).

The CEQ has also emphasized the importance of current and accurate information in NEPA analyses. Specifically, the NEPA regulations state that a supplemental analysis is necessary if "significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts" arise. *See* 40 C.F.R. § 1502.9(c)(1)(ii).

As this Court has noted and as Congress has recognized, the goals of NEPA "could be incorporated into the everyday functioning of the Federal Government only with great difficulty." *Andrus*, 442 U.S. at 349-50 (citation to legislative history omitted). The task, of course, is to recognize NEPA's continuing applicability in those cases

[14] S. REP. NO. 91-296 (1969), in explaining the origin of section 102(2)(C), stated, "[e]ach agency which proposes any major actions, such as project proposals, proposals for new legislation, regulations, policy statement, or expansions or revisions of ongoing programs," shall determine whether the proposal would have a significant effect on the environment. *Id.* at 20.

where the severity of the impacts remain amenable to agency amelioration while at the same time not attaching NEPA's documentary obligations to the sort of environmentally benign day-to-day routine management activities against which the Government in its brief appropriately cautions.

With respect to EISs the pertinent CEQ Regulation, section 1502.9(c), provides direction as to when supplement analysis is required. It states in part:

> (c) Agencies:
>
> (1) Shall prepare supplements to either draft or final environmental impact statements if:
>
> (i) The agency makes substantial changes in the proposed action that are relevant to environmental concerns; or
>
> (ii) *There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.*
>
> (2) May also prepare supplements when the agency determines that the purposes of the Act will be furthered by doing so. [Emphasis added.]

In 1981, the CEQ offered guidance on the subject of SEISs, which retains its continuing validity:

> As a rule of thumb, if the proposal has not been implemented, or if the EIS concerns an ongoing program, EISs that are more than 5 years old should be carefully reexamined to determine if the criteria in Section 1502.9 compel preparation of an EIS supplement.
>
> If an agency has made a substantial change in a proposed action that is relevant to environmental concerns, or if there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impact, a supplemental EIS must be prepared for an old EIS so that the agency has the best possible information to make any necessary substantive changes in its decisions regarding the proposal. Section 1502.9(c).

CEQ, *Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations*, 46 Fed. Reg. 18026, 18036, Q.32 (Mar. 23, 1981), as amended by 51 Fed. Reg. 15618 (Apr. 25, 1986).[15] Of course, where appropriate, EAs, with their lower thresholds of applicability, may need to be prepared to assist agencies in determining whether significant impacts exist.

It is *amici's* understanding that no Administrative Record was prepared in this case (the Government having concluded that there was no final agency action to warrant one). The factual underpinings of the case – the extent of environmental impact caused by ORVs on protected lands – must therefore be gleaned from the opinions of the courts below, the submissions of the parties, the publicly available NEPA documentation, which does bear on the actual impacts in the areas that are the subject of this

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[15] Courts routinely look to the "Forty Questions" for guidance. *See, e.g., Davis v. Mineta*, 302 F.3d 1104, 1125 (10th Cir. 2002) ("We apply the 'Forty Questions' here as persuasive authority offering interpretive guidance"); *Citizens against Burlington, Inc. v. Busey*, 938 F.2d 190, 195 (D.C. Cir. 1991, Thomas, Cir. J.); *Sierra Club v. Marsh*, 769 F.2d 868, 870 (1st Cir. 1985, Breyer, Cir. J.).

litigation, and, less directly, by reference to published decisions in other cases involving similar impacts.[16]

In this proceeding, the District Court noted that SUWA presented expert testimony on "the significant resource damage, including soil erosion and compaction, and destruction of vegetation" attributable to ORVs. *Southern Utah Wilderness Alliance v. Babbitt*, 2000 U.S. Dist. LEXIS 22170, at *12 (D. Utah Dec. 22, 2000). SUWA alleged that "ORV user figures have skyrocketed in the past ten years." *Id.* at *26. The District Court noted that BLM admitted to being "well-aware that ORV-caused damage is resulting from cross-country travel in [Wilderness Study Areas]." *Id.* at *16. "BLM has recognized that ORV use on public lands generally has increased over the past few years." *Id.* at *28.

The Court of Appeal for the Tenth Circuit in this proceeding, *Southern Utah Wilderness Alliance v. Norton*, 301 F.3d 1217 (10th Cir. 2002), noted that the BLM's Implementation Management plan (IMP) "gives specific attention to ORV use when discussing impairing activity." *Id.* at 1228, n.7. For example, the Plan specified that cross-country ORV use constitutes environmental impairment "because 'the tracks created by the vehicles leave depressions or ruts, compact the soils, and trample or compress vegetation.'" *Id.* (*citing* the BLM IMP). The Court concluded that

[16] It is not the purpose of this brief to take a position for or against the use of ORVs. Rather it is its purpose to emphasize that the existence of environmental impacts on an ongoing and apparently increasing basis in an area under ongoing federal agency management and under consideration for wilderness designation may and should implicate certain of NEPA's "action-forcing" devises to determine whether there are environmental impacts which would warrant the agency (or the Congress or the President) taking action to address those impacts.

SUWA's complaint "presents colorable evidence suggesting that ongoing ORV use has or is impairing the disputed WSA's wilderness values." *Id.* at 1233.

There were earlier NEPA documents covering at least portions of the geographic area that is the subject of this litigation. (*Amici* have been unable to determine their full scope.) For instance, the "Grand Resource Area Proposed Management Plan: FEIS," Moab District, Grand Resources Area (1983), discussed the designation of 1,183,660 acres as open to ORV use, and discussed the impacts on soil and water quality, vegetation, livestock grazing, and recreation, stating "Soils and Water Quality . . . Recreational ORV use is expected to increase on 47,840 acres. The severity of the impact would depend on the intensity of use. The effects of ORV activity on the desert environment are serious, long-lasting, and highly visible. . . ." Appellants' (SUWA et al.) Tenth Circuit Appendix (Appendix) at 632. The EIS went on to discuss limiting ORV use on 596,234 acres and the impacts that would have on soil and water quality, vegetation, livestock grazing, transportation, special designation areas, and visual resources and recreation. *Id.* at 632-633; *see also* "San Rafael: Proposed Resource Management Plan/FEIS" Moab District, San Rafael Resource Area (1991) at RMP-45 (projecting an assessment of ORV accessible road needs); Appendix at 109, 129 – EA Number UT-050-089-084-EA, "Off-Road Vehicle Implementation" Henry Mountains Planning Area (Aug. 1990) (projecting low ORV use); Appendix at 683 – EA UT-040-0-121, "Off-Road Vehicle Designation" Kanab Resource Area (Sept. 1980) ("[d]esert soils are particularly vulnerable to damage from ORV use") and *id.* at 687 (". . . no type of land can withstand sustained ORV use without some damage"). (Recent BIA "actions," at least one of

which resulted in NEPA documentation, are discussed in Section I(D)(1), *infra*.)[17]

More generally, courts in other proceedings have had occasion to deal with ORV impacts – alleged or real – on the environment. *See, e.g., Mausolf v. Babbitt*, 125 F.3d 661, 669 (8th Cir. 1997) (upholding Park Service closure of portion of park to snowmobiles based on impact on gray wolf); *Northwest Motorcycle Ass'n v. U.S. Dep't of Agric.*, 18 F.3d 1468 (9th Cir. 1994) (upholding Forest Service decision to close forest to ORVs based on damage to trails and species); *Sierra Club v. Clark*, 774 F.2d 1406, 1408-09 (9th Cir. 1985) (upholding BLM decision to allow ORV use in WSA after an EIS was prepared); *Fund for Animals v. Norton*, 294 F. Supp. 2d 92, 106 (D.D.C. 2003) (appeal pending) (setting aside Park Service rule allowing 950 snowmobiles a day into Yellowstone Park, quoting agency

[17] *Amici* understand from the record and the briefs of Respondent SUWA that there have been marked increases in ORV use in at least some of the areas involved since these earlier NEPA documents were prepared. For example, BLM manager for Henry Mountains area "admitted in his deposition testimony that" there had been a "very noticeable" and marked increase in ORV use in this area. *See* Appellants' (SUWA et al.) Opening Brief for the Tenth Circuit at 23. In addition, BLM issued an "emergency ORV closure" for "portions of the San Rafael Swell" and explained the necessity of the closure in part because "ORV use in the San Rafael Swell has increased tremendously" since the 1991 San Rafael EIS was completed. *See* 65 Fed. Reg. 15169-70 (March 21, 2000). Also, the BLM field office manager for the Behind the Rocks area admitted that there has been a "significant increase" in ORV use since the mid-1990s in the area. *See* Appellants' Opening Brief for the Tenth Circuit at 24. Finally, at the preliminary injunction hearing in the district court, a BLM assistant manager testified that "there has been a substantial increase in the off-road activity in the Indian Creek area" since the 1991 San Juan RMP was finalized. *Id.*

environmental studies of adverse impact on wildlife, air quality, natural surroundscapes, and natural odors.)

The potential for impact on public lands occasioned by ORVs has twice been addressed by the President, in both instances with the assistance of the CEQ. Two years after NEPA's enactment President Nixon signed Executive Order 11644 (1972) to limit the use of off-road vehicles on public lands. Exec. Order 11644, 37 Fed. Reg. 2877 (Feb. 9, 1972), *reprinted as amended in* 42 U.S.C.A. § 4321. In his February 8, 1972, message to Congress on the environment the President noted that the use of ORVs "is dramatically on the increase" and "[t]oo often the land has suffered as a result." *See* CEQ, *Environmental Quality* 1972 at 379. Several years later President Carter signed Executive Order 11989 (42 Fed. Reg. 26959 (May 25, 1977)), which tightened those limitations, finding in his message to Congress on the environment of May 24, 1977, that "[u]ncontrolled, [ORVs] have ruined fragile soils, harassed wildlife, and damaged archeological sites." CEQ, *Environmental Quality* 1977 at 356.

Amici respectfully submit that NEPA applies to the ongoing actions of BLM in its continuing management of areas under consideration for wilderness designation where "significant new circumstances or information relevant to environmental concerns" is present – such as a significant increase in ORV use with a resulting potential for significant increase in environmental impact. *See* 40 C.F.R. § 1502.9(c). While the record is sparse, the allegations of the plaintiffs below (respondents before this Court) would appear, if true, to pass the threshold of significance for an SEIS under section 102(2)(C). At minimum, section 102(2)(E) would apply, as it requires an examination of alternatives arising from "unresolved conflicts" concerning

"alternative uses of available resources." The resulting EA may or may not then lead to an EIS. The requirements of section 102(1) are similarly controlling upon the ongoing actions to be taken by BLM. *Amici* would suggest the matter be remanded, with appropriate direction to prepare an SEIS or, at minimum, to prepare a EA to determine whether such an EIS is needed. In its supplemental document the agency need not examine the impact of ORVs de novo, but need only supplement what it had done before.[18]

D. Even If No Supplemental Analysis Were Required For the Entire Ongoing Action, NEPA Is Nevertheless Applicable For Other Reasons

(1) There Have Been "Actions" Involving Less Than the Entire Geographic Area At Issue Here That Clearly Implicate NEPA.

In addition to the "on-going action" discussed above, this case presents more discrete, narrower "actions" that clearly trigger NEPA coverage (though not necessarily an EIS). Specifically, the BLM has issued several recent decisions regarding ORV access to various geographic

[18] We suggest an analogy to another case involving an agency's ongoing activity (or inactivity) resulting in a continuing course of environmental degradation. As the Fifth Circuit held in *Louisiana v. Lee*, 758 F.2d 1081 (5th Cir. 1985), *cert. den.* 475 U.S. 1044 (1986), a periodic permit renewal "will not maintain a status quo, but rather will continue a course of environmental disruption begun years ago." *Id.* at 1086. The Court of Appeals directed the trial court on remand to compare the environmental impact if the ongoing activity were allowed to continue for another five years with the projected condition if it were halted now. *Id.*

areas at issue in this case:[19] (With two exceptions, the briefs and documents cited do not show NEPA compliance.)

- For the Indian Creek Canyon Corridor, the BLM issued vehicle and camping restrictions limiting all motor vehicle and mountain bike travel to "existing roads and trails." 63 Fed. Reg. 110 (Jan. 2, 1998).
- In 2000, the Kanab Field Office adopted a land use plan amendment for the Moquith Mountain area. 65 Fed. Reg. 19921 (Apr. 13, 2000). The plan amendment focused on numerous concerns, including sensitive species and vehicle management, and "[o]ver 95 percent of the WSA is closed to [ORV] use." *See* Brief of Respondents, Utah Shared Access Alliance (USAA Brief) at 7 (citing to testimony of planning team leader describing planning process at 407). (The Brief notes that an EA was prepared. USAA Brief at 7.)
- The Moab Field Office released an "interim" restriction order that revised "open" travel designations and limited ORV use to existing roads and trails on approximately 245,642 acres. 66 Fed. Reg. 6659-6661 (Jan. 22, 2001). The restriction order also closed other specified locations to vehicle access. *Id.*; USAA Brief at 8.
- The Price Field Office also completed the San Rafael Route Designation Plan. This plan analyzed vehicle access issues under the purview of the Price Field Office, including the seven WSAs

[19] As stated in the Brief for Respondents, Utah Shared Access Alliance, *et al.* (aligned with the Government in this case) at 6, "BLM has also issued numerous project level decisions affecting vehicle access to specific areas targeted in SUWA's preliminary injunction motion."

covered by the March, 2000 closure order. The plan authorizes continued ORV travel along 677 miles of "secondary [ORV] routes" and closes 468 miles of routes to vehicle access. USAA Brief at 8; *see also* Environmental Assessment (January 31, 2002), available at http:// www.ut.blm.gov/ sanrafaelohv/ea/ea1contents. htm.

These actions, while confined to discrete geographical portions of the whole area at issue in this litigation, are themselves "actions" within the meaning of NEPA. Indeed, the Solicitor General has already conceded that agency decisions regarding ORV use are subject to section 706(1) of the APA. In *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 738-39 (1998), this Court noted that Land Use Plans that "close a specific area to off-road vehicles . . . can result in immediate concrete injury to a party with interest in the use of off-road vehicles in that area," thereby permitting immediate judicial review. This Court ultimately held that the *Ohio Forestry* plaintiffs did not have a justiciable claim under the APA. But at the same time, with significance for the instant case, the government conceded that if the *Ohio Forestry* plaintiffs' claim had been "that the plan was allowing motorcycles into a bird-watching area or something that like [sic], that would be immediately justiciable." *Id.* at 739.

(2) The Various Separate "Actions" Described in Section D(1) Above Could Constitute A "Program" Requiring Comprehensive Examination Under NEPA.

The subsidiary actions described under section D(1) above, each individually a potential NEPA trigger, together could constitute a program under NEPA that would also implicate NEPA's obligations. *See* 40 C.F.R. § 1508.18(b)(3) (an action includes the "[a]doption of programs, such as a

group of concerted actions to implement a specific policy or plan; systematic and connected agency decisions allocating agency resources to implement a specific statutory program or executive directive"); § 1502.4 (scope of EIS); § 1502.20 (tiering); 40 C.F.R. § 1508.23 ("A proposal may exist in fact as well as by agency declaration that one exists"); *Kleppe v. Sierra Club*, 427 U.S. 390, 409 (1976) (noting "general agreement" with the basic premise that section 102(2)(C) may require a comprehensive impact statement, for instance where several proposed actions are pending at the same time).[20] "Only through comprehensive consideration of pending proposals can the agency evaluate different courses of action." *Id.* at 410.

Whether such a "program" exists is a factual question for the lower court to determine. However, should the lower court find that such a program exits based on facts including those discussed above, then the agency's failure to evaluate the environmental impacts of the program could violate NEPA.

(3) Section 102(1) Commands Agencies to Pay Heed to the National Environmental Policy

As discussed in section I(B)(2) above, NEPA section 102(1) requires that agencies interpret and administer the policies, regulations, and public laws of the United States in accordance with NEPA's policies.

The BLM appears not to have heard that command. The BLM suggests that the Tenth Circuit's holding is "particularly troubling in light of [that] court's suggestions

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[20] The comprehensive EIS dealing with multiple proposals has come to be known as a "program" or "programmatic" EIS.

that BLM's resource constraints could not provide any justification for denying . . . relief." Pet. Brief at 39. Apparently, the BLM fears that NEPA will be invoked "to reorder agency priorities for the allocation of scarce resources,"[21] a possibility that it characterizes as "inimical to the effective functioning of government and to the separation of powers." Pet. Brief at 40.

Amici recognize that judicial second-guessing of administrators is generally poor policy. But agency disregard of Congressional direction is much worse. Congress has declared that section 102(1) was designed "to make it clear that each agency of the Federal Government shall comply with the directives set out in [section 102] unless the existing law applicable to such agency's operations" expressly prohibits or makes full compliance with one of the directives impossible. 115 CONG. REC. 40418 (1969) (Statement of Sen. Jackson explaining the intent of Senate participants in the Conference Committee considering NEPA); *see also* 115 CONG. REC. 39703 (1969) (Statement of Rep. John Dingell explaining the intent of House conferees); *Flint Ridge*, 426 U.S. at 785. BLM's brief identifies no statute or regulation that expressly prohibits the Bureau from allocating its resources so as fully to comply with NEPA. Nor has it identified any existing law that would render such an allocation impossible. *Amici* therefore urge this Court to reaffirm *Flint Ridge* by refusing to allow BLM to use "resource allocation" to excuse its failure to comply with NEPA.

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[21] The Government's choice of wording is particularly unfortunate in light of NEPA's requirement for the analysis of alternatives to any proposal "which involves unresolved conflicts concerning alternative uses of available resources; . . . " 42 U.S.C. § 4332(2)(E) (§ 102(2)(E)).

Petitioners' argument that non-compliance should be excused because BLM may perform NEPA analyses in the near future is similarly unavailing. Specifically, Petitioners assert that SUWA is not entitled to relief because BLM will conduct NEPA analyses "as circumstances permit . . . in connection with its contemplated revision of land use plans" Pet. Brief at 40. The vagueness of Petitioners' language only confirms that BLM is not committed to complying with NEPA in the near future. Even if it were, the idea that such a commitment would preclude liability for BLM's current failure to comply contradicts this Court's interpretation of section 102 in *Flint Ridge*. *See Flint Ridge*, 426 U.S. at 787. It also conflicts with Congress' clear intent that agencies fully comply with NEPA unless existing law prohibits compliance or renders it impossible, for no such law exists here. *See* 115 CONG. REC. 40418 (1969) (statement of Sen. Jackson); *see also* 115 CONG. REC. 39703 (1969) (statement of Rep. Dingell). Furthermore, Petitioners' argument runs counter to precedent in the Courts of Appeal holding that the fulfillment of future obligations does not excuse a current failure to act. *See Portland Audubon Soc'y v. Babbitt*, 998 F.2d 705, 709 (9th Cir. 1993).

(4) CEQ's NEPA Regulations Treat "Inaction" Reviewable As "Action" Under the APA as "Action" for Purposes of NEPA's EIS Requirement.

The CEQ regulations consider unlawful inaction by an agency to be an "action" for purposes of NEPA. *See* 40 C.F.R. § 1508.18 (defining "major federal action" in part, "[a]ctions include the circumstance where the responsible officials fail to act and that failure is reviewable by courts

or administrative tribunals under the Administrative Procedure Act or other applicable law as agency action").[22] The Tenth Circuit held that the BLM's "inaction" with regard to ORV damage to the WSAs constitutes "agency action unlawfully withheld or unreasonably delayed" under the APA. *Southern Utah Wilderness Alliance v. Norton*, 301 F.3d 1217, 1229 (10th Cir. 2002). If this Court upholds that determination, such "inaction" also constitutes an "action" under NEPA.

As we emphasized in the Statement at the beginning of this brief, we take no position on the proper implementation of the APA and other issues presented by this appeal. We note the provision within section 1508.18 only to indicate that were the Court to affirm the Tenth Circuit with respect to its interpretation of the APA, certain NEPA obligations would follow. Of course, the converse does not necessarily follow. Section 1508.18 in defining what constitutes "major federal action" deals only with the threshold requirement for an EIS under section 102(2)(C). It does not affect the lower threshold, discussed in section I(B)(1) of this brief, for an EA prepared under section 102(2)(E).

[22] In *Ramsey v. Kantor*, 96 F.3d 434, 444-445 (9th Cir. 1996), the Ninth Circuit found that a "mandatory obligation" to review certain plans sufficient to make the failure to disapprove those plans a major federal action under NEPA. *Id. citing* 40 C.F.R. § 1508.18. Thus, the Ninth Circuit concluded that the Secretary's failure to disapprove the plans rises to the level of major federal action for purposes of NEPA. *Id.*

(5) The Government Concedes That Citizens Can Request Particular Actions from Agencies, Thereby Implicating NEPA.

The government alleges that "the appropriate course" for citizens concerned "that an agency is not administering a program in accordance with statutory requirements" is to "request particular action from the agency." *See* Pet. Brief at 36. The government concedes that the agency's action on this request would then constitute final agency action, and would be reviewable under section 706(2) of the APA. *Id.*[23]

While acknowledging – and appreciating – the Government's concession, *amici* do note that the proffered avenue of relief, while welcome, can be extraordinarily time-consuming.[24]

[23] In its Reply Brief for Petitioners, at page 10, supporting its application for a writ of certiorari the Government stated:

> If a party such as SUWA believes that an agency should take final agency action to implement a statutory standard, the party may petition the agency for a rulemaking. *See, e.g.*, 5 U.S.C. 553(e). If the petition is denied, the party may seek judicial review under Section 706(2) based on the agency's explanation and the administrative record. And if the agency delays unreasonably in responding to such a petition, Section 706(1) may come into play to compel the agency to respond, although not how to respond.

[24] If an agency is truly responsive, the Government's suggestion can be a most welcome one. If, however, an agency chooses neither to act nor decline to act upon a proposal, courts have traditionally been, understandably, reluctant to mandate speedy action on the part of often burdened agencies. *See, e.g., Fund for Animals v. Norton*, 294 F. Supp. 2d at 113 (a reasonable time for an agency decision could encompass months, occasionally a year or two).

CONCLUSION

In short, NEPA is a vital and crucial tool that agencies use to evaluate the environmental impacts of their actions – both projects and programs. We urge the Court to recognize, as it did in *Marsh v. Oregon Natural Res. Council*, *supra*, that not all federal actions are one time events, with one-time NEPA responsibilities. Many involve sequences of ongoing action that involve ongoing responsibilities under NEPA. We urge the Court to reaffirm the principle that during the course of an ongoing federal action, the government's obligation to take a hard look at environmental consequences is not terminated by a single decision or NEPA document if those consequences exceed earlier projections and the agency action is a continuing one. Agency consideration of later-arising circumstances or information regarding the environmental impacts of its actions, while those actions remain ongoing, is essential to fulfilling NEPA's goals of environmentally informed decision-making.

In these circumstances we respectfully suggest that the ongoing NEPA responsibilities (as described in this brief) that attach to BLM's ongoing actions merit recognition by this Court and require further compliance by the agency whose ongoing actions are the subject of this case.

Dated: February 2004

Respectfully submitted,

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Supreme Court, U.S.
FILED
MAR 10 2004
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(16)

No. 03-101

In the Supreme Court of the United States

GALE NORTON, SECRETARY OF THE INTERIOR, ET AL.,
PETITIONERS

v.

SOUTHERN UTAH WILDERNESS ALLIANCE, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED: JULY 18, 2003
CERTIORARI GRANTED: NOV. 3, 2003

TABLE OF CONTENTS

Court of Appeals Docket Entries 1
District Court Docket Entries 10
District Court Order (Feb. 9, 2001) 56
Excerpts from BLM Interim Management Policy 58
BLM Information Bulletin No. 99-181 119
Excerpts from Off-Road Vehicle Implementation: Henry Mountains Planning Area 122
Excerpts from San Rafael Management Plan 152
Excerpts from Defendants' Response to Plaintiffs' First Set of Requests for Admission (Apr. 27, 2000) 164
Excerpts from Transcript of Hearing (Aug. 28, 2000) 167
Excerpts from Transcript of Hearing (Aug. 29, 2000) 169
Excerpts from Transcript of Hearing (Aug. 30, 2000) 174
Excerpts from Defendants' Response to Plaintiffs' Supplemental Briefing (Nov. 7, 2000) 177
Exhibit to Plaintiffs' Rule 28(j) Letter to Tenth Circuit (Feb. 8, 2002) 179
Excerpts from Plaintiffs' Memorandum in Support of Motion for Preliminary Injunction (June 14, 2000) 184
Exhibits from Preliminary Injunction Hearing (July 11, 2000) 186
Exhibits from Hearing (Aug. 28, 2000) 188

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 01-4009

SOUTHERN UTAH WILDERNESS ALLIANCE, ET AL.

v.

GALE NORTON, SECRETARY, UNITED STATES DEPARTMENT OF THE INTERIOR, ET AL.,
DEFENDANTS-APPEELLEES

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
1/25/01	Civil case docketed. Preliminary record filed. DATE RECEIVED: 1/22/01. Docketing statement due 2/5/01 for Southern Utah Wilderness, et al., transcript order form due 2/5/01 for Rebecca Janke pursuant to r. 42.1. Notice of appearance due 2/5/01 for Anthony Chatterly, Elite Motorcycle, Blue Ribbon, Shared Access, Wayne County, Kane County, Trust Lands Admin., Emergy County, San Juan County, Utah, BLM, Tom Fry, Bruce Babbitt, Friends of the Abajo, American Lands, UT Council of Trout, Wildlands CPR, Old Broads, Sierra Club, Wilderness Society, and Southern Utah. (mt)

DATE	PROCEEDINGS
1/26/01	Notice filed that the transcript is already on file in district court. Notice due that record is complete 2/9/01 for Dale A. Kimball. (sl)
	* * * * *
1/29/01	Docketing statement filed by Wilderness Society, Sierra Club, Great Old Broads, Wildlands CPR, UT Council of Trout, American Lands, Friends of the Abajo, Southern Utah. Original and 4 copies c/s: y. (sl)
	* * * * *
2/5/01	Order filed by PF (ktc) - Briefing on the merits is tolled. Within 30 days counsel must serve and file in this court a district court order either granting Rule 54 (b) certification as to the order appealed, or explicitly adjudicating all remaining claims. Rule 54(b) certification due 3/7/01 for James S. Angell, Robert B. Wiygul, Stephen H.M. Bloch and Heidi J. McIntosh. Parties served by mail. (mt)
	* * * * *
2/6/01	Filed notice record is complete 1/30/01 (dla)

DATE	PROCEEDINGS
2/14/01	Notice of appearance filed by Paul A. Turcke as attorney for Shared Access, Blue Ribbon, Elite Motorcycle, and Anthony Chatterly. CERT. OF INTERESTED PARTIES (y/n): y (dla)
	* * * * *
2/22/01	Rule 54(b) certification filed by Stephen H.M. Bloch, Staff Attorney for Southern Utah Wilderness Alliance. (mt)
3/5/01	Order filed by PF (ktc) referring Rule 54 (b) certification and jurisdictional issue TO PANEL ON THE MERITS. Appellant's brief and appendix due 4/16/01 for Friends of the Abajo, et al. Parties served by mail. (kjs)
	* * * * *
5/14/01	Appellants' brief filed by Southern Utah, Wilderness Society, Sierra Club, Great Old Broads, Wildlands CPR, UT Council of Trout, American Lands, Friends of the Abajo. Original and 7 copies. c/s: y. Served on 5/14/01. Oral argument? y., Appendix filed. Original and 1 appendix copy. Appendix Pages: 903. Appellees brief due 6/18/01 for Anthony Chatterly, for Elite

DATE	PROCEEDINGS
	Motorcycle, for Blue Ribbon, for Shared Access, for Wayne County, for Kane County, for Trust Lands Admin., for Emery County, for San Juan County, for Utah, for BLM, for Nina Rose Hatfield, for Gale Norton. (kjs)
5/14/01	Oversized record filed. Record can be located at Section: T Shelf: 2 (das)
	* * * * *
7/18/01	Appellees' brief by Shared Access, Blue Ribbon, Elite Motorcycle and Anthony Chatterly. Original and 7 copies. c/s: y. Served on 7/17/01. Oral Argument? y. Appendix filed. Original and 1 appendix copy. Appendix Pages: 177. (afw)
7/23/01	Appellees' deficient brief filed by Utah, San Juan County, Emery County, Trust Lands Admin., Kane County, Wayne County. Appellee's corrected brief due 8/3/01 for Wayne County, for Kane County, for Trust Lands Admin., for Emery County, for San Juan County, for Utah. (no oral argument statement on cover, no prior/related appeal statement, green cover) (sl)

DATE	PROCEEDINGS
7/31/01	Appellees' brief filed by Utah, San Juan County, Emery County, Trust Lands Admin., Kane County, Wayne County. Original and 7 copies. c/s: y. Served on 7/30/01. Oral Argument? y. (sl)
8/2/01	Appellees' deficient brief filed by Gale Norton and BLM. Appellee's corrected brief due 8/16/01 for BLM and Gale Norton. (dab)
	* * * * *
8/16/01	[1440421] Appellee's brief filed by Gale Norton, Nina Rose Hatfield and BLM. Original and 7 copies. c/s: y. Served on 8/15/01. Oral Argument? y. Appendix filed. Original and 1 appendix copy. Appendix Pages: 73. Appellants' optional reply brief due 9/4/01 for Friends of the Abajo, for American Lands, for UT Council of Trout, for Wildlands CPR, for Great Old Broads, for Sierra Club, for Wilderness Society and for Southern Utah. (dab)
	* * * * *
9/25/01	Appellants' reply brief filed by Southern Utah, Wilderness Society, Sierra Club, Great Old Broads, Wildlands CPR, UT Council of Trout, American Lands, Friends of the Abajo. Original and 7 copies. c/s: y. (sl)

DATE	PROCEEDINGS
	* * * * *
1/2/02	Appellant's supplemental authority filed by Southern Utah and submitted to court. Original and 7 copies. c/s: y (sl)
1/14/02	Case argued by James S. Angell for the appellant; Susan Pachloski and Paul A. Turcke for the appellees, and submitted to Judges Ebel, McKay, Lucero. (hrs)
2/8/02	Appellant's supplemental authority filed by Southern Utah, et al., and submitted to court. Original and 3 copies. c/s: y (kjs)
2/15/02	Federal Appellees' response filed by Gale Norton, et al., to Appellants' supplemental authority and submitted to court. Original and 3 copies. c/s: y (mt)
2/19/02	Appellees' response to appellants' supplemental authority filed by Shared Access, Blue Ribbon, Elite Motorcycle, Anthony Chatterly and submitted to court. Original and 3 copies. c/s: y. (sl)
2/26/02	Response filed by Intervenors Wayne County, Kane County, Trust Lands Admin., Emery County, San Juan County and Utah to Appellants' supplemental authority filed on 2/8/02. Original and 3 copies. c/s: y (afw)

DATE	PROCEEDINGS
2/27/02	Intervenors' Response to appellants' supplemental authority of 2/8/02 filed by Appellees Wayne County, Kane County, Trust Lands Admin., Emery County, San Juan County and Utah submitted to court. Document (afw)
8/29/02	Terminated on the Merits after Oral Hearing Reversed and Remanded; Written, Signed, Published. Ebel, authoring judge; McKay, concurring in part and dissenting in part; Lucero. [1-4009] (kf)
	* * * * *
10/9/02	Petition for rehearing in banc [01-4009] filed by Shared Access, Blue Ribbon, Elite Motorcycle, Anthony Chatterly. Original and 14 copies. c/s: y. (sl)
10/9/02	Petition for rehearing in banc filed by Appellees Shared Access, Blue Ribbon, Elite Motorcycle, Anthony Chatterly submitted to panel. (sl)
	* * * * *

DATE	PROCEEDINGS
11/26/02	Petition for rehearing in banc filed by Gale Norton and BLM. Original and 14 copies. c/s: y. (kf)
11/27/02	Petition for rehearing in banc file by Appellees Gale Norton and BLM submitted to panel. (kf)
	* * * * *
12/3/02	Order filed by Judges Ebel, McKay and Lucero: Appellants' response to the appellees' two petitions for rehearing due 12/18/02 for friends of the Abajo, for American Lands, for UT Council of Trout, for Wildlands CPR, for Great Old Broads, for Sierra Club, for Wilderness Society and for Southern Utah. Parties served by mail. (kf)
1/24/03	Appellees' supplemental authority filed by Gale Norton, Nina Rose Hatfield, BLM and submitted to court. Original and 15 copies. c/s: y. (sl)
	* * * * *

DATE	PROCEEDINGS
1/31/03	Appellants' response to the petitions for rehearing/rehearing en banc filed by Southern Utah, Wilderness Society, Sierra Club, Great Old Broads, Wildlands CPR, UT Council of Trout, American Lands and Friends of the Abajo. Original and 14 copies. c/s: y (kf)
2/3/03	Appellants' response filed by Southern Utah, Wilderness Society, Sierra Club, Great Old Broads, Wildlands CPR, UT Council of Trout, American Lands, Friends of the Abajo submitted to court. (kf)
2/18/03	Order filed by Judges Ebel, McKay and Lucero denying the two Petitions for rehearing in banc (no poll). (kf)
2/26/03	Mandate issued. Mandate receipt due 3/28/03. (kg)
3/7/03	Mandate receipt filed. (kg)
	* * * * *

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF UTAH

No. 99-CV-852

SOUTHERN UTAH WILDERNESS ALLIANCE, ET AL.

v.

GALE NORTON, SECRETARY, UNITED STATES
DEPARTMENT OF THE INTERIOR, ET AL.,
DEFENDANTS-APPEELLEES

RELEVANT DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
10/27/98	1	Complaint filed, assigned to Judge Dale A. Kimball Receipt #: 100728 (asb) [Entry date 10/28/99]
	* * * * *	
11/23/99	4	Amended complaint by So UT Wilderness, Wilderness Soc, Sierra Club, Great Old Broads, Wildlands CPR, UT Council Trout, Amer Lands Alliance, Friends of the Abajo added party(ies): Amends [1-1] complaint (alf) [Entry date 11/24/99]

DATE	DOCKET NUMBER	PROCEEDINGS
11/24/99	5	Motion to intervene by UT Shared Access, Blue Ribbon, Elite Motorcycle, Anthony Chatterly (asb) [Entry date 11/29/99]
11/24/99	6	Memorandum by UT Shared Access, Blue Ribbon, Elite Motorcycle, Anthony Chatterly in support of [5-1] motion to intervene by UT Shared Access, Blue Ribbon, Elite Motorcycle, Anthony Chatterly (asb) [Entry date 11/29/99]
11/24/99	7	Declaration of Adena Cook Re: [5-1] motion to intervene by UT Shared Access, Blue Ribbon, Elite Motorcycle, Anthony Chatterly (asb) [Entry date 11/29/99]
11/24/99	8	Declaration of Brian Hawthorne Re: [5-1] motion to intervene by UT Shared Access, Blue Ribbon, Elite Motorcycle, Anthony Chatterly (asb) [Entry date 11/29/99]

DATE	DOCKET NUMBER	PROCEEDINGS
11/24/99	9	Declaration of Brian Hawthorne Re: [5-1] motion to intervene by UT Shared Access, Blue Ribbon, Elite Motorcycle, Anthony Chatterly (asb) [Entry date 11/29/99]
11/24/99	10	Declaration of Dale Parriott Re: [5-1] motion to intervene by UT Shared Access, Blue Ribbon, Elite Motorcylcle, Anthony Chatterly (asb) [Entry date 11/29/99]
11/24/99	—	Proposed document from UT Shared Access, Blue Ribbon, Elite Motorcyle, Anthony Chatterly entitled "Answer" (asb) [Entry date 11/29/99]
		* * * * *
2/7/00	20	Memorandum by So UT Wilderness, Wilderness Soc, Sierra Club, Great Old Broads, Wildlands CPR, UT Council Trout, Amer Lands Alliance, Friends of the Abajo in opposition to [5-1] motiǒn to intervene by UT Shared Access, Blue Ribbon,

DATE	DOCKET NUMBER	PROCEEDINGS
		Elite Motorcycle, Anthony Chatterley (hom) [Entry date 02/08/00]
		* * * * *
2/7/00	21	Response by Bruce Babbitt, Tom Fry, BLM to [5-1] motion to intervene by UT Shared Access, Blue Ribbon, Elite Motorcyle, Anthony Chatterly (hom) [Entry date 02/09/00]
		* * * * *
2/11/00	22	Magistrate Notice of Hearing Initial Pretrial Conference set for 10:00 3/23/00 To be held before Judge Boyce cc: atty (Ntc generated by: IPT Sheet/Chambers RNB) (hom) [Entry date 02/11/00]
2/18/00	23	2nd Declaration of Brian Hawthorne (hom) [Entry date 02/22/00]

DATE	DOCKET NUMBER	PROCEEDINGS
2/18/00	24	Reply by UT Shared Access, Blue Ribbon, Elite Motorcycle, Anthony Chatterley to response to [5-1] motion to intervene by UT Shared Access, Blue Ribbon, Elite Motorcycle, Anthony Chatterly (hom) [Entry date 02/22/00]
3/3/00	25	Notice of Hearing filed: Motion hearing set for 10:00 3/16/00 for [5-1] motion to intervene by UT Shared Access, Blue Ribbon, Elite Motorcycle, Anthony Chatterly To be held before Judge DAK. Cc: atty (Ntc generate by: DAK Courtroom Deputy, KJ) (ce) [Entry date 03/03/00]
3/7/00	26	Report of Attorney Planning Meeting (hom) [Entry date 03/08/00]
3/16/00	27	Minute entry: Motion hearing held for [5-1] motion to intervene by UT Shared Access, Blue Ribbon, Elite Motorcycle, Anthony Chatterly [5-1] motion to intervene by UT Shared Access, Blue Ribbon,

DATE	DOCKET NUMBER	PROCEEDINGS
		Elite Motorcycle, Anthony Chatterly taken under advisement; Judge: DAK Court Reporter: Kelly Hicken Court Deputy: Kim Jones (kj) [Entry date 03/16/00]
3/22/00	28	Order granting [5-1] motion to intervene by UT Shared Access, Blue Ribbon, Elite Motorcycle, Anthony Chatterly signed by Judge Dale A. Kimball, 3/21/00 cc: atty (alf) [Entry date 03/23/00]
3/23/00	29	Scheduling order setting deadline for filing of all motions 4:30 10/2/00; Discovery cutoff 4:30 9/1/00; Final Pretrial Conference for 2:30 4/10/01; Jury Trial for 8:30 4/30/01 Rule 26(f)(1) cnf held. Expert witness disclosure dates set. Not Referred to ADR. Discovery limits set. Signed by Judge Ronald N. Boyce 3/23/00 cc: atty. Settlement Potential: Fair (slh) [Entry date 03/24/00]

DATE	DOCKET NUMBER	PROCEEDINGS
4/4/00	30	Amended Scheduling order Setting Deadline for filing of all motions 4:30 10/2/00; Discovery cutoff 4:30 9/1/00; Final Pretrial Conference for 2:30 4/10/01; 10 day Bench Trial for 8:30 4/30/01 Rule 26(f)(1) cnf held. Expert witness disclosure dates set. Not referred to ADR. Discovery limits set. Signed by Judge Ronald N. Boyce 4/2/00 cc: atty. Settlement Potential: Fair (hom) [Entry date 04/04/00]
4/6/00	31	Answer by Anthony Chatterly, Elite Motorcycle, Blue Ribbon, UT Shared Access to 1st amended complaint (asb) [Entry date 04/07/00]
	* * * * *	
5/15/00	37	Unopposed Motion by So UT Wilderness for leave to file 2nd amd cmp (kam) [Entry date 05/15/00] [Edit date 05/15/00]

DATE	DOCKET NUMBER	PROCEEDINGS
5/15/00	38	Memorandum by So UT Wilderness in support of [37-1] unopposed motion for leave to file 2nd amd cmp (kam) [Entry date 05/15/00]
5/15/00	—	Proposed document from So UT Wilderness entitled, "Second Amended Complaint." Lodge until approved by order. (kam) [Entry 05/15/00]
5/16/00	39	Order granting [37-1] motion for leave to file 2nd amd cmp signed by Judge Dale A. Kimball, 5/16/00 cc: atty. (jmo) [Entry date 05/16/00]
5/18/00	40	2nd amended complaint by Friends of the Abajo, Amer Lands Alliance, UT Council Trout, Wildlands CPR, Great Old Broads, Sierra Club, Wilderness Soc, So UT Wilderness added party(ies): None. Amends [4-1] first amended complaint (hom) [Entry 05/19/00]
6/1/00	—	NTC by Friends of the Abajo, Amer Lands Alliance, UT Council Trout, Wildlands

DATE	DOCKET NUMBER	PROCEEDINGS
		CPR, Great Old Broads, Sierra Club, Wilderness Soc, So UT Wilderness hereinafter will be referred to as: All Plaintiffs; party added (hom) [Entry 06/02/00]
6/5/00	42	Expert report of G. Ronald Wright filed by So UT Wilderness (tsi) [Entry date 06/06/00]
6/5/00	44	Expert report of Dr. Howard Wilshire filed by All Plaintiffs (hom) [Entry 06/07/00]
6/5/00	45	Exhibits 1-3 in the form of photographs on compact discs filed by all plaintiffs RE: [44-1] expert rpt of Dr. Howard Wilshire. Compact discs are placed in oversized filed labeled as Volume A & B. (hom) [Entry date 06/07/00] [Edit date 06/07/00]
		* * * * *
6/14/00	53	Motion by All Plaintiffs for preliminary injunction (ksj) [Entry date 06/15/00]
		* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
6/14/00	55	Memorandum by All Plaintiffs in support of [53-1] motion for preliminary injunction (ksj) [Entry date 06/15/00]
6/14/00	56	Exhibits Volume 1 filed by all plaintiffs All Plaintiffs RE: [55-1] support memorandum (ksj) [Entry date 06/15/00]
6/14/00	57	Exhibit Volume 2 filed by All Plaintiffs RE: [55-1] support memorandum (ksj) [Entry date 06/15/00]
		* * * * *
6/15/00	59	Notice of Hearing filed by All Plaintiffs Motion hearing set for 8:30 7/11/00 for [53-1] motion for preliminary injunction To be held before Judge DAK (Ntc generated by: Plas' Cnsl) (asb) [Entry dated 06/16/00]
		* * * * *
6/29/00	67	Clarification/Addendum to [55-1] plas' support memorandum re: mot/prelin injunction filed by All Plaintiffs. (hom) [Entry date 06/30/00]

DATE	DOCKET NUMBER	PROCEEDINGS
6/30/00	70	Motion by All Plaintiffs for temporary restraining order to prevent the threat of off-road vehicle damamge (tsi) [Entry date 07/06/00]
	* * * * *	
7/6/00	71	Suppl Expert report of Dr. Howard Wilshire filed by All Plaintiffs. Note: suppl is contained on two digital CD's CD's are in file labeled as Volume B (hom) [Entry date 07/06/00] [Edit date 07/07/00]
	* * * * *	
7/6/00	74	Response to BLM, Tom Fry, Bruce Babbitt to [55-1] plas' memo in support of mot for prelim inj (asb) [Entry date 07/07/00]
7/6/00	75	Memorandum by Anthony Chatterly, Elite Motorcycle, Blue Ribbon, UT Shared Access in opposition to [70-1] motion for temporary restraining order to prevent the threat of off-road vehicle damamge (asb) [Entry date 07/07/00]

DATE	DOCKET NUMBER	PROCEEDINGS
7/6/00	76	Declaration of Norman Carroll RE: [75-1] Memorandum by Anthony Chatterly, Elite Motorcycle, Blue Ribbon, UT Shared Access in opposition to [70-1] motion for temporary restraining order to prevent the threat of off-road vehicle damamge (asb) [Entry date 07/07/00]
7/6/00	77	Declaration of Wes Thompson, PG Re: [75-1] Memorandum by Anthony Chatterly, Elite Motorcycle, Blue Ribbon, UT Shared Access in opposition to [70-1] motion for temporary restraining order to prevent the threat of off-road vehicle damamge (asb) [Entry date 07/07/00]
7/6/00	78	Declaration of Mark Habbeshaw Re: [75-1] Memorandum by Anthony Chatterly, Elite Motorcycle, Blue Ribbon, UT Shared Access in opposition to [70-1] motion for temporary restraining order to prevent the threat

of off-road vehicle damamge (asb) [Entry date 07/07/00]

DATE	DOCKET NUMBER	PROCEEDINGS
7/6/00	79	Declaration of Wes Thompson, PG Re: [75-1] Memorandum by Anthony Chatterly, Elite Motorcycle, Blue Ribbon, UT Shared Access in opposition to [70-1] motion for temporary restraining order to prevent the threat of off-road vehicle damamge (asb) [Entry date 07/07/00]
7/6/00	80	Declaration of Margaret Fugate Swasey, Re: [75-1] Memorandum by Anthony Chatterly, Elite Motorcycle, Blue Ribbon, UT Shared Access in opposition to [70-1] motion for temporary restraining order to prevent the threat of off-road vehicle damamge (asb) [Entry date 07/07/00]
		* * * * *
7/10/00	85	Motion by ST UT, San Juan Cnty, Emery Cnty for limited intervention (as dfts) by ST UT, San Juan Cnty, Emery Cnty, and to dismiss

DATE	DOCKET NUMBER	PROCEEDINGS
		for failure to join indispensable parties, and to stay proceedings (hom) [Entry date 07/10/00]
7/10/00	86	Memorandum by ST UT, San Juan Cnty, Emery Cnty in support of [85-1] motion for limited intervention (as dfts) by ST UT, San Juan Cnty, Emery Cnty, [85-2] motion to dismiss for failure to join indispensable parties, [85-3] motion to stay proceedings (hom) [Entry date 07/10/00] [Edit date 07/10/00]
7/10/00	87	Reply by All Plaintiffs to response to [70-1] motion for temporary restraining order to prevent the threat of off-road vehicle damamge (asb) [Entry date 07/11/00]
7/10/00	88	Declaration of Liz Thomas Re: [87-1] response reply to mot for temp restraining order (asb) [Entry date 07/11/00]

DATE	DOCKET NUMBER	PROCEEDINGS
7/10/00	89	Declaration of Herb McHarg Re: [87-1] response reply to mot for temp restraining order (asb) [Entry date 07/11/00]
7/10/00	90	Minute entry: phone cnf held in chambers to decide whether or not to proceed w/ Mot/TRO sched 9:00 7/11/00; after hrg argument of cnsl, Crt ruled that evidence will be heard in the mot/TRO as scheduled; briefing sched set for mot/Intervene; responses due 7/19/00, reply due 7/26/00; Motion hearing set for 3:30 7/31/00 for [85-1] motion for limited intervention (as dfts) by ST UT, San Juan Cnty, Emery Cnty, set for 3:30 7/31/00 for [85-2] motion to dismiss for failure to join indispensable, set for 3:30 7/31/00 for [85-3] motion to stay; Judge: DAK Reporter: Becky Janke Court Deputy: Kim Jones (kj) [Entry date 07/11/00]

DATE	DOCKET NUMBER	PROCEEDINGS
7/11/00	91	Minute entry: Hearing held on motion for TRO; pla invoked the exclusionary rule; dft obj; Crt sustained the obj: opening stmts made; testimony & evidence heard; hrg cont to 9:00 7/12/00; Judge: DAK Court Reporter: Kelly Hicken Court Deputy: Kim Jones (kj) [Entry date 07/13/00]
7/12/00	91	Minute entry: Hrg on Mot/Tro cont; testimony & evidence rec'd; closing arguments heard; Crt took the motion under advisement & will issue ruling on 7/21/00 or advise cnsl that it is inappropriate to rule on this motion prior to hrg on 7/31/00 for mot/intervene; Judge: DAK Court Reporter: Becky Janke Court Deputy: Kim Jones (kj) [Entry date 07/13/00]

DATE	DOCKET NUMBER	PROCEEDINGS
7/12/00	92	Witness and Exhibit list from hrg on Mo/TRO held 7/11/00 and 7/12/00. Exhibits are in custody of law clerk Anne Morgan. (kj) [Entry date 07/13/00]
7/13/00	93	Addendum to [86-1] support memorandum filed by ST UT, San Juan Cnty, Emery Cnty. (tsi) [Entry date 07/14/00]
		* * * * *
7/19/00	95	Response/Statement of Non-Opposition by Anthony Chatterly, Elite Motorcycle, Blue Ribbon, UT Shared Access to [85-1] motion for limited intervention (as dfts) by ST UT, San Juan Cnty, Emery Cnty (asb) [Entry date 07/20/00]
7/19/00	96	Response by BLM, Tom Fry, Bruce Babbitt to [85-1] motion for limited intervention (as dfts) by ST UT, San Juan Cnty, Emery Cnty, [85-2] motion to dismiss for failure to join indispensable parties, [85-3] motion (asb) [Entry date 07/20/00]

DATE	DOCKET NUMBER	PROCEEDINGS
7/19/00	97	Response by All Plaintiffs to [85-1] motion for limited intervention (as dfts) by ST UT, San Juan Cnty, Emery Cnty (asb) [Entry date 07/20/00]
7/19/00	97	Memorandum by All Plaintiffs in opposition to [85-2] motion to dismiss for failure to join indispensable parties (asb) [Entry date 07/20/00]
7/19/00	98	Declaration of Jennifer Korb (asb) [Entry date 07/20/00]
		* * * * *
7/21/00	101	Order denying [70-1] motion for temporary restraining order to prevent the threat of off-road vehicle damamge signed by Judge Dale A. Kimball, 7/20/00 cc: atty (hom) [Entry date 07/21/00]
		* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
7/26/00	103	Reply by Anthony Chatterly, Elite Motorcycle, Blue Ribbon, UT Shared Access to response to [85-1] motion for limited intervention (as dfts) by ST UT, San Juan Cnty, Emery Cnty, [85-2] motion to dismiss for failure to join indispensable parties (hom) [Entry date 07/27/00]
		* * * * *
7/31/00	105	Minute entry: Motion hearing held for [85-1] motion for limited intervention (as dfts) by ST UT, San Juan Cnty, Emery Cnty, held for [85-2] motion to dismiss for failure to join indispensable parties, held for [85-3] motion [85-1] motion for limited intervention (ad dfts) by ST UT, San

DATE	DOCKET NUMBER	PROCEEDINGS
		Juan Cnty, Emery Cnty taken under advisement, [85-2] motion to dismiss for failure to join indispensable parties taken under advisement, [85-3] motion to say taken under advisement; Judge: DAK Court Reporter: Becky Janke Court Deputy: Kim Jones (kj) [Etnry date 07/31/00]
		* * * * *
8/4/00	107	Expert report of Andrew E. Godfrey filed by BLM, Tom Fry, Bruce Babbitt (hom) [Entry date 08/07/00]
8/4/00	108	Order granting [85-1] motion for limited intervention (as dfts) by ST UT, San Juan Cnty, Emery Cnty, Kane Cnty, Wayne Cnty and School and Institutional Trust Lands Admin (note; Wayne & Kane Cnty and School Trust Lands were added in Movant's reply memo) denying [85-2] motion to dismiss for failure to join

DATE	DOCKET NUMBER	PROCEEDINGS
		indispensable mooting/ denying [85-3] motion to stay proceedings. School Trust and counties are hereby joined in this action and subsequent captions should so reflect. State will be allowed to intervene if it chooses to waive its sovereign immunity. Signed by Judge Dale A. Kimball, 8/4/00 cc: atty (hom) [Entry date 08/07/00] [Edit date 08/07/00)
8/7/00	109	Answer by BLM, Tom Fry, Bruce Babbitt to 2nd amended complaint (hom) [Entry date 08/08/00]
		* * * * *
8/8/00	111	Motion by All Plaintiffs to dismiss plas' 9th cause of action in the 2nd amd cmp (hom) [Entry date 08/09/00]
8/8/00	111	Request for Expedited Ruling by All Plaintiffs RE: [111-1] motion to dismiss plas' 9th cause of action in the 2nd amd cmp (hom) [Entry date 08/09/00]

DATE	DOCKET NUMBER	PROCEEDINGS
8/8/00	112	Memorandum by All Plaintiffs in support of [111-1] expedited ruling requested, [111-1] motion to dismiss plas' 9th cause of action in the 2nd amd cmp (hom) [Entry date 08/09/00]
8/10/00	113	Notice of Hearing filed: Motion hearing set for 9:00 8/28/00 for [53-1] motion to preliminary injunction (4 days) To be held before Judge Kimball cc: atty (Ntc generated by: Courtroom Dep KJ). Changed from 8/28 at 2:00 (hom) [Entry date 08/11/00]
8/10/00	114	Answer by Anthony Chatterley, Elite Motorcycle, Blue Ribbon, UT Shared Access, intervenor dfts, to 2nd amended complaint (hom) [Entry date 08/11/00]
8/15/00	115	Expert report of Wes Thompson, P.G. filed by Anthony Chatterly, Elite Motorcycle, Blue Ribbon, UT Shared Access (hom) [Entry date 08/16/00]

DATE	DOCKET NUMBER	PROCEEDINGS
8/16/00	—	Transcript of Proceedings for date(s) of 7/11/00. Court Reporter: Kelly Hicken re: motion for TRO held before Judge Kimball. Volume 1 (hom) [Entry date 08/16/00]
8/17/00	116	Response by Anthony Chatterly, Elite Motorcycle, Blue Ribbon, UT Shared Access to [111-1] plas' motion to dismiss plas' 9th cause of action in the 2nd amd cmp (hom) [Entry date 08/17/00]
8/17/00	117	Motion by BLM, Tom Fry, Bruce Babbitt to dismiss plas' ninth cause of action w/prej (alt) [Entry date 08/18/00]
8/17/00	118	Memorandum by BLM, Tom Fry, Bruce Babbitt: in opposition to [111-1] plas' motion to dismiss plas' 9th cause of action in the 2nd amd cmp; in support of [117-1] dfts' motion to dismiss plas' ninth cause of action w/prej (alt) [Entry date 08/18/00]

DATE	DOCKET NUMBER	PROCEEDINGS
8/21/00	119	Reply by All Plaintiffs to response to [111-1] motion to dismiss plas' 9th cause of action in the 2nd amd cmp (hom) [Entry date 08/22/00]
		* * * * *
8/23/00	121	Suppl Memorandum by All Plaintiffs in support of [111-1] plas' motion to dismiss plas' 9th cause of action in the 2nd amd cmp (hom) [Entry date 08/24/00]
		* * * * *
8/25/00	123	Motion by Anthony Chatterly, Elite Motorcycle, Blue Ribbon, UT Shared Access, intervenor dfts. to dismiss portions of plas' 2nd amd cmp with dismissal, first, fifth, sixth and ninth causes of action (hom) [Entry date 08/28/00]
8/25/00	124	Memorandum by Anthony Chatterly, Elite Motorcycle, Blue Ribbon, UT Shared Access in support of [123-1] motion to dismiss portions of

DATE	DOCKET NUMBER	PROCEEDINGS
		plas' 2nd amd cmp with dismissal, first, fifth, sixth and ninth causes of action (hom) [Entry date 08/28/00]
		* * * * *
8/25/00	125	Declaration of Paul A. Turcke (hom) [Entry date 08/28/00]
8/28/00	127	Motion by Anthony Chatterly, Elite Motorcycle, Blue Ribbon, UT Shared Access in limine limiting presentation of evidence & argument to the appl of plas' lst, 5th, & 6th causes of action to the Parunuweap, Moquith Mountain, Behind the Rocks & Sids Mountain Wilderness Study Areas & appl of plas' lst & 5th causes of action to the Factory Buttle Special Monitoring Area (asb) [Entry date 08/28/00]
8/28/00	128	Memorandum by Anthony Chatterly, Elite Motorcycle, Blue Ribbon, UT Shared Access in support of [127-1]

DATE	DOCKET NUMBER	PROCEEDINGS
		motion in limine limiting presentation of evidence & argument to the appl of plas' lst, 5th, & 6th causes of action to the Parunuweap, Moquith Mountain, Behind the Rocks & Sids Mountain Wilderness Study Areas & appl of plas' 1st & 5th causes of action to the Factor Butte Special Monitoring Area (asb) [Entry date 08/28/00]
		* * * * *
8/28/00	130	Motion by ST UT, San Juan Cnty, Emery Cnty, Kane Cnty, Wayne Cnty in limine re: pla's attempt to present evidence & req injunctive relief from this Court re: public lands reinventoried for wilderness characteristics in 1996 by Dept. of Interior Secretary Bruce Babbitt (asb) [Entry date 08/28/00]
8/28/00	131	Memorandum by ST UT, San Juan Cnty, Emery Cnty, Kane Cnty, Wayne Cnty in support of [130-1] motion in

DATE	DOCKET NUMBER	PROCEEDINGS
		limine re: pla's attempt to present evidence & req injunctive relief from this Court re: public lands reinventoried for wilderness characteristics in 1996 by Dept. of Interior Secretary Bruce Babbitt (asb) [Entry date 08/28/00]
8/28/00	132	Minute entry: Motion hearing held for [130-1] motion in limine re: pla's attempt to present evidence & req injunctive relief from this Court re: public lands reinventoried for wilderness characteristics in 1996 by Dept. of Interior Secretary Bruce Babbitt, held for [127-1] motion in limine limiting presentation of evidence & argument to the appl of plas' lst, 5th, & 6th causes of action Rocks & Sids Mountain Wilderness Study Areas & appl of plas' 1st & 5th causes of action to the Factory Butte Special Monitoring Area, held for [123-1]

DATE	DOCKET NUMBER	PROCEEDINGS
		motion to dismiss portions of plas' 2nd amd cmp with dismissal, first, fifth, sixth and ninth causes of action, held for [117-1] motion to dismiss plas' ninth causes of action w/prej, held for [111-1] motion to dismiss plas' 9th cause of action in the 2nd amd cmp, held for [53-1] motion to preliminary injunction; Dft St UT allowed to intervene; pla invoked exclusionary rule, dft objected; Crt sustained the obj; pla waived its opening stmt; dfts' opening stmts made; testimony & evidence rec'd; [111-1] motion to dismiss plas' 9th cause of action in the 2nd amd cmp taken under advisement, [117-1] motion to dismiss plas' ninth cause of action w/prej taken under advisement, [123-1] motion to dismiss portions of plas' 2nd amd cmp with dismissal, first, fifth, sixth and ninth

DATE	DOCKET NUMBER	PROCEEDINGS
		causes of action taken under advisement; Crt denied [127-1] motion in limine limiting presentation of evidence & argument to the appl of plas' 1st, 5th & 6th causes of action to the Parunuweap, Moquith Mountain, Behind the Rocks & Sids Mountain Wilderness Study Areas & appl of plas' lst & 5th causes of action to the Factory Butte Special Monitoring Area; denied [130-1] motion in limine re: pla's attempt to present evidence & req injunctive relief from this Court re: public lands reinventoried for wilderness characteristics in 1996 by Dept. of Interior Secretary Bruce Babbitt; Pla rested; dfts' case presented; Crt recessed at 5:15 pm, to resume 9:00 8/29/00; Judge: DAK Court Reporter: Karen Murakami/Laura Robinson Court Deputy: Kim Jones (kj) [Entry 08/29/00]

DATE	DOCKET NUMBER	PROCEEDINGS
8/29/00	—	Motion hearing re: [53-1] motion for preliminary injunction cont w/all parties present. Testimony & evidence rec'd. Crt recessed at 5:15 pm, to resume 9:00 8/30/00. Court Reporter: Laura Robinson Court Deputy: Kim Jones (kj) [Entry date 08/30/00]
8/30/00	—	Motion hearing re: [53-1] motion for preliminary injunction cont w/all parties present. Testimony & evidence rec'd. Dft St UT proffered declaration of Kevin Carter & testimony of other witnesses. Proffer of St UT's claim as would be represented thru testimony of witnesses was accepted; declaration of Kevin Carter will be filed in the morning. Dft St UT offered exhibits 10-108; ech were admitted. Crt recessed at 5:30pm, to resume 9:00 8/31/00. Court Reporter: Kelly Hicken Court Deputy: Kim Jones (kj) [Entry date 8/31/00]

DATE	DOCKET NUMBER	PROCEEDINGS
8/31/00	—	Motion hearing re: [53-1] motion for preliminary injunction Cont w/all parties present. Mr. Andrews adv Crt that declaration of Kevin Carter has been filed & distributed to Cnsl. Cnsl reviewed doc & accepted it. Testimony & evidence rec'd. All parties rested. Crt directed pla to file its 2 briefs by 9/21/00; dft's responses due by 10/12/00; reply due 10/23/00. Closing arguments heard. Crt took mot/prelim inj under advisement. Court Reporter: Kelly Hicken Court Deputy: Kim Jones (kj) [Entry date 08/31/00]
8/31/00	133	Witness and Exhibit list for hrg on Mot/Preliminary Injunction, 8/28/00-8/31/00. (kj) [Entry date 08/31/00]
8/31/00	134	Declaration of Kevin S. Carter (hom) [Entry date 09/06/00]

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DATE	DOCKET NUMBER	PROCEEDINGS
9/29/00	141	Reply by All Plaintiffs to response to [111-1] motion to dismiss plas' 9th cause of action in the 2nd amd cmp, [53-1] motion for preliminary injunction (ce) [Entry date 10/02/00]
9/29/00	141	Memorandum by All Plaintiffs in opposition to [123-1] motion to dismiss portions of plas' 2nd amd cmp with dismissal, first, fifth, sixth and ninth causes of action, [117-1] motion to dismiss plas' ninth cause of action w/prej (ce) [Entry date 10/02/00]

* * * * *

11/6/00	158	Response/Memorandum by Anthony Chatterly, Elite Motorcycle, Blue Ribbon, UT Shared Access to [117-1] motion to dismiss ninth cause of action w/prej, [111-1] motion to [53-1] motion for preliminary injunction (asb) [Entry date 11/07/00]

DATE	DOCKET NUMBER	PROCEEDINGS
11/6/00	159	Declaration of Forrest Sims Re: [158-1] Response/Memorandum by Anthony Chatterly, Elite Motorcycle, Blue Ribbon, UT Shared Access to [117-1] motion to dismiss ninth cause of action w/prej, [111-1] motion to dismiss plas' 9th cause of action in the 2nd amd cmp, [53-1] motion to preliminary injunction (asb) [Entry date 11/07/00]
		* * * * *
11/6/00	162	State's Response by San Juan Cnty, Emery Cnty, Kane Cnty, Wayne Cnty to [53-1] motion for preliminary injunction and to SUWA's suppl briefing (hom) [Entry date 11/07/00]
11/6/00	163	Response by BLM, Tom Fry, Bruce Babbitt to [111-1] motion to dismiss plas' 9th cause of action in the 2nd amd cmp. [53-1] motion for preliminary injunction (hom) [Entry date 11/07/00]
		* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
11/22/00	172	Suppl Briefing/Reply by All Plaintiffs to response to [53-1] motion for preliminary injunction and seventh cause of action - Suppl NEPA (hom) [Entry date 11/27/00]
		* * * * *
12/13/200	176	Minute entry: Motion hearing held for [123-1] motion to dismiss portions of plas' 2nd amd cmp with dismissal, first, fifth, sixth and ninth causes of action, held for [117-1] motion to dismiss plas' ninth cause of action w/prej, held for [111-1] motion to dismiss plas' 9th cause of action in the 2nd amd cmp, held for supp NEPA claim; [123-1] motion to dismiss portions of plas' 2nd amd cmp dismissal, first, fifth, sixth and ninth causes of action taken under advisement, [117-1] motion to dismiss plas' ninth cause of action w/prej taken under advisement, motion to dismiss plas'

DATE	DOCKET NUMBER	PROCEEDINGS
		9th cause of action in the 2nd amd cmp taken under advisement. [53-1] motion for preliminary injunction taken under advisement; supp NEPA claim taken under advisement; Judge: DAK Court Reporter: Becky Janke Court Deputy: Kim Jones (kj) [Entry date 12/14/00]
		* * * * *
12/22/00	178	Memorandum Decision & Order granting [123-1] Recreationists' motion to dismiss portions of plas' 2nd amd cmp with dismissal, first, fifth, sixth and seventh causes of action to the extent they pertain to the WSAs and 202 areas addressed during the prelim injunction hrg are DISMISSED with prejudice. The ninth causes of action, however, is not dism based upon this motion. Granting [111-1] plas' motion to dismiss plas' 9th cause of

DATE	DOCKET NUMBER	PROCEEDINGS
		action in the 2nd amd cmp, dismissing the 9th cause of action in the 2nd amd cmp without prejudice denying as moot [53-1] plas' motion for preliminary injunction. Mooting [117-1] BLM's motion to dismiss plas' ninth cause of action w/prejudice as BLM has now stated that it does not oppose dismissal w/o prejudice signed by Judge Dale A. Kimball, 12/22/00. Cc: attys cc: atty (hom) [Entry date 12/22/00]
		* * * * *
1/16/01	181	Notice of appeal by So UT Wilderness, Wilderness So, Sierra Club, Great Old Broads, Wildlands CPR, UT Council Trout, Amer Lands Alliance, Friends of the Abajo; Fee Status: Paid, receipt 109977, Appealing the denial of plas motion for prel inj and granting dft-intervenors Utah Shared

DATE	DOCKET NUMBER	PROCEEDINGS
		Access Alliance, et al mot/ dism entered 12/22/00, memo decision no. 178 (ce) [Entry date 01/18/01]
1/18/01	182	Notice of appeal and certified copy of docket to USCA: [181-1] appeal. Appeal packets mailed to counsel of record. (ce) [Entry date 01/18/01]
1/22/01	183	Unopposed Motion by All Plaintiffs to stay proceedings pending 10th circuit disposition of pla's appeal (hom) [Entry date 01/23/01]
1/23/01	184	Order granting [183-1] motion to say proceedings pending 10th circuit's disposition of pla's appeal signed by Judge Dale A. Kimball, 1/23/1 cc: atty (hom) [Entry date 01/24/01]
1/24/01	—	Action STAYED. See Order No. 184 (hom) [Entry date 01/24/01]

DATE	DOCKET NUMBER	PROCEEDINGS
1/29/01	185	Transcript requested by Stephen H.M. Bloch, cnsl for So UT Wilderness for [181-1] appeal - the necessary transcript is already on file in the District Crt (ce) [Entry date 01/29/01]
1/29/01	—	Transcript of Proceedings for date(s) of 12/13/00. Court Reporter: Rebeccs Janke re: various motions heard and preliminary injunction held before Judge Kimball (hom) [Entry date 01/29/01]
1/30/01	186	Record is complete for purposes of appeal. Notice has been mailed to cnsl. (ce) [Entry date 01/30/01]
1/30/01	—	Notice of Docketing Appeal Letter from USCA Re: [181-1] appeal USCA NUMBER: 01-4009 (ce) [Entry date 01/31/01]

DATE	DOCKET NUMBER	PROCEEDINGS
2/7/01	187	Show Cause Order from the Tenth Circuit Court of Appeals signed by Kathleen T. Clifford, Deputy Clerk 2/5/01. Briefing on the merits is tolled pending further order of this court. (jmo) [Entry date 02/907/02]
2/9/01	188	Order. It is hereby Ordered that the Clerk of the Court is directed, purs to rule 54(b), to enter judgment in favor of the dfts and dft-intervenors on plas' first, fifth, sixth and seventh claims for relief to the extent these claims pertain to the WSAs and 202 areas addressed during the prelim injunction hrg signed by Judge Dale A. Kimball, 2/9/1 cc: atty (hom) [Entry date 02/09/01]

DATE	DOCKET NUMBER	PROCEEDINGS
2/12/01	189	Judgment for Anthony Chatterley, Elite Motorcycle, Blue Ribbon, UT Shared Access, BLM, Tom Fry, Bruce Babbitt against All Plaintiffs. Pursuant to the order of the court of 2/9/1, the jgm of the court in favor of the dfts and dft-intervenors on plas' first, fifth, sixth and seventh claims for relief to the extent these claims pertain to the WSAs and 202 Areas addressed during the prelim injunction hrs, is entered as final under Rule 54(b) of the Federal Rules of Civil Procedure. Signed by LSYork, Chief Deputy, 2/9/1, cc: atty [EOD 2/12/01] (hom) [Entry date 02/12/01]
3/12/01	190	Order from the Tenth Circuit Court of Appeals by Kathleen T. Clifford, Deputy Clerk Attorney 3/5/01. The order states: The court reserves jgm on the appellate jurisdictional issue raised in the show cause order. The

DATE	DOCKET NUMBER	PROCEEDINGS
		jurisdictional issue along with the district court's 2/9/01 Order will be submitted to panel to handle this civil appeal. The opening brief and appendix of Plas must be served and filed 40 days after the date of this order. (jmo) [Entry date 03;12/01]
		* * * * *
7/10/02	206	NTC of case reassignment to Judge Paul G. Cassell. cc: atty (alt) [Entry date 07/10/02]
8/16/02	207	Order affirming [148-1] (b)(1)(A) referral order signed by Judge Paul G. Cassell, 8/16/02 cc: atty (alt) [Entry date 08/19/02]
9/12/02	—	Transcript of Proceedings for date(s) of 8/30/00 re: motion hrg held before DAK. Court Reporter: Kelly Brown Hicken (alt) [Entry date 09/12/02] [Edit date 09/12/02]

DATE	DOCKET NUMBER	PROCEEDINGS
9/12/02	—	Transcript of Proceedings for date(s) of 8/31/00 re: motion hrg held before DAK. Court Reporter: Kelly Brown Hicken (alt) [Entry date 09/12/02]
2/28/03	208	Certified copy of mandate from USCA Re: [186-1] complete appeal, [181-1] appeal REVERSED and REMANDED. According to the USCA 10th Circuit the JGM of the USDC for the District of Utah is REVERSED and the case is REMANDED for further proceedings in accordance with the opinion of this court. (asp) [Entry date 03/03/03]
3/3/03	209	Copy of Appeal Mandate Docket Ltr mailed to counsel of record. (asp) [Entry date 03/03/03]
4/14/03	–	STAY lifted. Mandate from the 10th Circuit 02/28/2003 (tl) [Entry date 04/14/2003]

DATE	DOCKET NUMBER	PROCEEDINGS
4/15/03	210	Notice of Hearing filed: status conference set for 3:30 5/22/03. To be held before Judge PGC cc: atty (Ntc generated by: PGC's crtrm dep) (tsh) [Entry date 04/15/03]
5/5/03	211	Order, Ptys to file status memo by 5/19/03, status conference set for 3:30 5/22/03 signed by Judge Paul G. Cassell, 05/05/03 cc: atty (tsh) [Entry date 05/06/03]
5/19/03	212	Memorandum RE: Procedural Status filed by Anthony Chatterly, Elite Motorcycle, Blue Ribbon, UT Shared Access (tsh) [Entry date 05/20/03]
5/19/03	213	Memorandum RE: Status/ Scheduling Conference filed by ST UT, San Juan Cnty, Emery Cnty, Sch and Institutional, Kane Cnty, Wayne Cnty (tsh) [Entry date 05/20/03]

DATE	DOCKET NUMBER	PROCEEDINGS
5/19/03	214	Status Report filed by BLM, Tom Fry, Bruce Babbitt (tsh) [Entry date 05/20/03]
5/19/03	215	Memorandum RE: Status Conference filed by All Plaintiffs (tsh) [Entry date 05/20/03]
5/22/03	216	Minute entry: terminated deadlines; Judge: Paul Cassell proposed scheduling order discussed. Court will enter a scheduling order reflecting the dates discussed. If Cert is granted, the court will stay the proceedings. Court Reporter: Karen Murakami Court Deputy: Trisha Little (tl) [Entry date 05/23/03]
5/23/03	217	Scheduling order setting: Deadline for filing of all motions 4/28/04; Discovery cutoff: Fact - 1/14/04, Expert - 4/14/04; Final Pretrial Conference for 3:00 8/30/04; 5-Day Bench Trial for 8:30 9/13/04. See file/image for further details. Signed by

DATE	DOCKET NUMBER	PROCEEDINGS
		Judge Paul G. Cassell 05/22/03 cc: atty. (tsh) [Entry date 05/27/03]
5/29/03	218	Letter from US Supreme Court Re: Notice of Petitions for Writ of Certiorari Re: USCA NUMBER: 02-1703 (asp) [Entry date 05/30/03]
	* * * * *	
7/23/03	221	THIRD Amended complaint by Amer Lands Alliance, UT Council Trout, Wildlands CPR, Great Old Broads, Sierra Club, Wilderness Co, So UT Wilderness, Redrock Forests added party(ies): Redrock Forests. Removed party Friends of the Abajos. Substituted Gale Norton for Bruce Babbitt and Kathleen Clark for Tom Fry. Amends [40-1] second amended complaint. (tsh) [Entry date 07/29/03]
7/28/03	222	Letter from US Supreme Court Re: Notice of Petition for Writ of Certiorari Re: USCA NUMBER: 03-101 (asp) [Entry date 07/30/03]

DATE	DOCKET NUMBER	PROCEEDINGS
	* * * * *	
8/21/03	224	Answer by ST UT, San Juan Cnty, Emery Cnty, Sch and Institutional, Kane Cnty, Wayne Cntry to THIRD amended complaint (kam) [Entry date 08/22/03]
8/25/03	225	Answer by Anthony Chatterly, Elite Motorcycle, Blue Ribbon, UT Shared Access to third amended complaint (tsh) [Entry date 08/27/03]
	* * * * *	
10/14/03	230	Answer by BLM, Kathleen Clarke, Gale Norton to third amended complaint (tsh) [Entry date 10/15/03]
	* * * * *	

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH CENTRAL DIVISION

Case No. 2:99CV852K

SOUTHERN UTAH WILDERNESS ALLIANCE, ET AL., PLAINTIFFS

vs.

BRUCE BABBITT, ET AL., DEFENDANTS

AND

UTAH SHARED ACCESS ALLIANCE, ET AL., DEFENDANT-INTERVENORS

AND

SAN JUAN COUNTY, UTAH, ET AL., DEFENDANT-INTERVENORS

ORDER

After a six-day evidentiary hearing on Plaintiffs' motions for a temporary restraining order and for a preliminary injunction, and after a subsequent hearing on Defendant-Intervenors Utah Shared Access Alliance, et al.'s Motion to Dismiss, which pertained to the claims that were the subject of the preliminary injunction hearing, this court, on December 22, 2000, issued a Memorandum Decision and Order (the "December 22 Order"). The December 22 Order, among other things, dismissed with prejudice Plaintiffs' First, Fifth, Six, and Seventh Claims for Relief to the extent they pertain to the wilderness study areas ("WSAs") and the § 202 Areas addressed during the preliminary injunction hearing. Consequently, the court also denied as moot Plaintiffs' Motion for a Preliminary Injunction.

The court finds that there is no just reason for delay and expressly directs the entry of judgment on these claims pursuant to Rule 54(b) of the Federal Rules of Civil Procedure ("Rule 54(b)").

Accordingly, for good cause appearing, IT IS HEREBY ORDERED that the Clerk of the Court is directed, pursuant to Rule 54(b), to enter judgment in favor of Defendants and Defendant-Intervenors on Plaintiffs' First, Fifth, Six, and Seventh Claims for Relief, to the extent these claims pertain to the WSAs and § 202 Areas addressed during the preliminary injunction hearing.

DATED this 9th day of February, 2001.

BY THE COURT:

/s/ DALE A. KIMBALL
DALE A. KIMBALL
United States District Judge

INTERIM MANAGEMENT POLICY FOR LANDS UNDER WILDERNESS REVIEW

U.S. Department of the Interior
Bureau of Land Management

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INTRODUCTION

This handbook describes the policies under which the Bureau of Land Management (BLM) will manage lands under wilderness review until Congress either designates these lands as wilderness or releases them for other purposes. This policy is referred to as the "interim" management policy (IMP) because it applies to specific areas of the public lands for a limited amount of time, depending upon various stages and schedules of the review process. The purpose of the policies is to guide BLM staff in the specific decisions that arise every day in the management of lands under wilderness review.

There are three categories of public lands to which this policy applies: (1) Wilderness Study Areas (WSAs) identified by the wilderness review required by Section 603 of the Federal Land Policy and Management Act (FLPMA), (2) legislative WSAs (WSAs established by Congress), and (3) WSAs identified through the land-use planning process in Section 202 of FLPMA. These categories together are referred to as "lands under wilderness review."

Current WSAs include those identified through FLPMA Sections 603 and 202 wilderness study, "instant study areas" (previously designated primitive or natural areas) which FLPMA also required to be

studied, and one wilderness study area in the Central Arctic Management Area of Alaska which was designated for study by the Alaska National Interest Lands Conservation Act of 1980 (ANILCA). Additional WSAs will be identified periodically through BLM's land-use planning process.

Future wilderness inventories of public lands administered by the BLM in Alaska will be conducted pursuant to Section 1320 of ANILCA. Special provisions in ANILCA for the interim management of future WSAs in Alaska will be developed at the time wilderness inventories are allowed. Pending further policy guidance from the Secretary of the Interior, wilderness inventories and the identification of WSAs subject to an IMP in Alaska under the provisions of Sections 201 and 202 of FLPMA are not to be undertaken.

Congressionally mandated studies lead to recommendations from the Secretary of the Interior to the President, and from the President to Congress. Those studies conducted through BLM's recurring land-use planning system will lead to recommendations for each area found to be suitable or nonsuitable for wilderness designation. Only Congress can designate an area as wilderness, or release from interim management areas that were placed under wilderness study by Congressional authority.

The IMP is temporary and applies only during the time an area is under wilderness review and until Congress acts on WSAs, or where applicable, by a final decision by the BLM. After Congress acts on the President's recommendations for each WSA, a different policy will apply to the area, depending on whether or not Congress designates the area as wilderness. Areas

designated as wilderness will be managed under BLM Manual 8560—Management of Designated Wilderness Areas and under the regulations at 43 CFR 8560. Areas released from wilderness study will no longer be subject to the IMP, and will be managed under general BLM management policies and applicable land-use plans.

The IMP is not the only policy that governs the management of lands under wilderness review. The BLM has many other laws and policies to carry out which may affect whether and how an activity may take place on lands under wilderness review.

Mandates from Congress

In FLPMA, Congress gave BLM its first unified, comprehensive mandate on how the public lands should be managed. The law established a policy of retaining the public lands in Federal ownership, and it directed the BLM to manage them under principles of multiple use and sustained yield. Management decisions for the public lands are made through land-use planning processes that consider all potential uses of each land area, including wilderness. All public lands are to be managed so as to prevent unnecessary or undue degradation of the lands as required by Section 302(b) of FLPMA.

Under FLPMA, wilderness preservation is part of BLM's multiple-use mandate, and wilderness values are recognized as part of the spectrum of resource values considered in the land-use planning process. Section 603 of FLPMA specifically directed the BLM, for the first time, to carry out a wilderness review of the public lands. Continued evaluation of lands as wilderness can be considered in the future under Section 202 of

FLPMA. (The complete text of Section 603 appears in Appendix A of this document.)

Section 603(c) of FLPMA tells the BLM how to manage lands under wilderness review, in these words:

> During the period of review of such areas and until Congress has determined otherwise, the Secretary shall continue to manage such lands according to his authority under this Act and other applicable law in a manner so as *not to impair the suitability of such areas for preservation as wilderness* . . . (emphasis added).

This language is referred to as the "nonimpairment" mandate.

The wilderness review required by Section 603 of FLPMA focused on roadless areas of 5,000 acres or more and on roadless islands. The BLM as a matter of policy used its general management authority under Sections 302 and 202 of FLPMA to include in the wilderness review certain other roadless areas. These included: (1) areas smaller than 5,000 acres that were not islands, (2) areas less than 5,000 acres that had wilderness characteristics in association with contiguous roadless lands managed by another agency, and (3) lands place under BLM administration after the wilderness inventory was conducted in 1978-80. The management mandate in Section 603(c) does not apply to roadless areas being studied under Section 202 of FLPMA. However, as a matter of policy, the BLM will use its management authority under Section 302 of FLPMA to apply a modified form of interim management to these areas, as is explained in Chapter I.A.5.

There are six different practical effects of provisions in FLPMA with respect to "interim management" of lands under wilderness review:

1. The general standard for interim management is that lands under wilderness review must be managed so as not to impair their suitability for preservation as wilderness. We will refer to this as the "nonimpairment" standard. This applies to all uses and activities except those specifically exempted from this standard by FLPMA (such as grandfathered uses).
2. Permitted activities in WSAs (except grandfathered and valid existing rights) are temporary uses that create no new surface disturbance, nor involve permanent placement of structures.
3. Those grazing, mining, and mineral leasing uses that existed on October 21, 1976, (the date FLPMA was approved) may continue in the same manner and degree as on that date, even if this would impair wilderness suitability.
4. Lands under wilderness review may not be closed to appropriation under the mining laws in order to preserve their wilderness character.
5. Valid existing rights must be recognized.
6. All lands must be managed to prevent unnecessary or undue degradation.

Meaning of the Congressional Mandate of
Nonimpairment

To determine what is permissible under the general "nonimpairment" standard, we must examine what Congress meant by *impairment* of an area's *suitability for preservation as wilderness.*

The term "suitability . . . for preservation as wilderness" originated in the Wilderness Act of 1964, which directs the Secretary of Agriculture to "review, as to its *suitability* or nonsuitability *for preservation as wilderness*" each of the national forest areas classified as "primitive."

Likewise, the Wilderness Act directs the Secretary of the Interior to review certain roadless areas and islands in the National Park System and in the national wildlife refuges and game ranges and "report to the President his recommendation as to the *suitability* or nonsuitability of each such area or island *for preservation as wilderness.*" The term is similarly used in Section 603(a) of FLPMA, which directs the Secretary of the Interior to review certain roadless areas and islands and to "report to the President his recommendation as to the *suitability* or nonsuitability of each such area or island *for preservation as wilderness.*" (Emphasis added.)

In the Wilderness Act and FLPMA, the term "suitability" implies two things. First, it implies that, at the minimum, the area satisfies the definition of wilderness in Section 2(c) of the Wilderness Act:

> "A wilderness, in contrast with those areas where man and his own works dominate the landscape, is hereby recognized as an area where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain. An area of wilderness is further defined to mean in this Act an area of undeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habitation, which (1) generally appears to have been affected

primarily by the forces of nature, with the imprint of man's work substantially unnoticeable; (2) has outstanding opportunities for solitude or a primitive and unconfined type of recreation; (3) has at least five thousand acres of land or is of sufficient size as to make practicable its preservation and use in an unimpaired condition; and (4) may also contain ecological, geological, or other features of scientific, educational, scenic, or historical value."

The Department therefore has a responsibility under the nonimpairment standard to ensure that each WSA satisfies this definition at the time Congress makes a decision on the area. As a practical matter, this means that once identified as a WSA the area must meet this definition until designated as wilderness or released for other uses.

The word "suitability" takes on a second meaning in the context of recommendations made by the Secretary and the President to Congress. Congress made it clear in Section 603 of FLPMA that an area with all the necessary wilderness characteristics as defined in Section 2(c) of the Wilderness Act might be found by the Secretary to be either "suitable" or "nonsuitable" for preservation as wilderness. Since each WSA must have wilderness characteristics in order to qualify for wilderness study under the mandate of FLPMA, it seems clear that the Secretary must protect the wilderness values of *each* WSA until Congress makes the final decision regardless of the suitable/nonsuitable recommendation made.

The Department therefore has a responsibility to ensure that the existing wilderness values of *all* WSAs, whether studied pursuant to Section 603 of FLPMA or future suitable WSAs identified through BLM's land-

use planning system, are not degraded so far, compared with the area's values for other purposes, as to significantly constrain the Congress's prerogative to either designate a WSA as wilderness or release it for other uses.

Any conflicts with this Congressional mandate would constitute impairment of the area's suitability for preservation as wilderness.

Management to the Nonimpairment Standard

Management to the nonimpairment standard does not mean that the lands will be managed as though they has already been designated as wilderness. For example, some uses that could not take place in a designated wilderness area may be permitted under the IMP because they are only temporary uses that do not create surface disturbance or involve permanent placement of structures. For example, organized off-road vehicle events or organized contests such as competitive trial rides and endurance/survival exercises that meet the nonimpairment criteria, might be permitted in WSAs, but would not be allowed in designated wilderness. Such temporary uses may be allowed if such use can easily and immediately be terminated upon designation of the lands involved as wilderness.

For the WSAs identified under the requirements of Section 603 of FLPMA, certain activities were allowed during the inventory and study phases if their impacts could be reclaimed by the time the Secretary forwarded recommendations to the President. This reclamation opportunity ended in September 1992 for all WSAs recommended under the requirements of Section 603. This is the date upon which the Secretary sent these final recommendations to the President. Generally, all

activities (except as listed under "Exceptions" in Section I.B.2., such as grandfathered and valid existing rights) permitted in WSAs after a reclamation deadline has passed, *must be temporary uses that create no surface disturbance, nor involve permanent placement of structures.*

Some uses that were explicitly permitted by the Wilderness Act of 1964 in wilderness areas of the national forests (such as mining and mineral leasing, which were allowed to continue until December 31, 1983) have been restricted under the IMP because their impacts clearly would have disqualified the area from satisfying the wilderness definition, and thus would have impaired wilderness suitability. During the wilderness review, and until Congress acts, it is the later and more explicit FLPMA, and not the Wilderness Act of 1964, that dictates what is permissible.

The final decision on permanent wilderness designation for each WSA recommendation forwarded by the Secretary, belongs to Congress. Management under the nonimpairment standard protects Congress' prerogative to make the designation decision by preventing actions that would pre-empt that decision.

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CHAPTER I. MANAGEMENT POLICY FOR LANDS UNDER WILDERNESS REVIEW

GENERAL POLICY

1. The BLM's management policy is to continue resource uses on lands under wilderness review in a manner that maintains the area's suitability for preservation as wilderness. The IMP will remain in effect on all congressionally mandated WSAs until Congress acts on the Secretary's

recommendations. Areas identified as WSAs under Section 202 of FLPMA will receive interim management protection upon designation as a WSA. Those WSAs studied under Section 202 of FLPMA and subsequently found to be nonsuitable for wilderness designation may be released from interim management by the BLM State Director 30 days after approval of the land-use plan. Suitable WSAs studied under Section 202 of FLPMA will be studied using the Bureau's procedures for such areas, remaining under IMP protection until Congress acts. In the interest of consistency with related land-use plans, the State Director also has the option of keeping such areas in wilderness study status, and under interim management, until final decisions have been made on adjacent areas under wilderness review.

2. The law provides for, and the BLM's policy is to allow, continuation of grazing, mining, and mineral leasing uses on lands under wilderness review in the manner and degree in which these uses being conducted on October 21, 1976, as long as they do not cause unnecessary or undue degradation of the lands These are referred to as the "grandfathered" uses.

3. The BLM's policy is to allow appropriate under the mining laws; i.e., these areas, in accordance with the congressional mandate, will not be withdrawn from the operation of the mining laws for the purpose of preserving their wilderness character. Activities involved in appropriation under the mining laws after October 21, 1976,—including location of new claims and the assessment work necessary to hold claims—will be

allowed as long as these activities are carried out in a manner that does not impair the area's wilderness suitability.

4. The BLM's policy is to recognize valid existing rights that existed on October 21, 1976. A further explanation of the policy on valid existing rights appears in Section B.9., below.

5. If a WSA is being studied under Section 202 of FLPMA, existing and new mining operations under the 1872 Mining Law will be regulated under the regulations 43 CFR 3802 only to prevent unnecessary of undue degradation of the lands, not to prevent impairment of wilderness suitability. All other activities will be managed under the IMP. Although FLPMA does not require Section 202 WSAs to be given interim management protection, the Bureau has the authority under Section 302 of FLPMA to manage these lands similarly. The authority to regulate activities to the nonimpairment standard with respect to the mining laws only applies to the areas that meet the criteria of Section 603, either islands or roadless areas of 5,000 acres or more that have wilderness characteristics. Section 302 provides the authority to regulate mining on all public lands to prevent unnecessary or undue degradation.

6. State Directors will assure a level of monitoring and surveillance of each WSA adequate to prevent, detect, and mitigate unauthorized activities and to properly supervise authorized uses and facilities. The level of monitoring and surveillance will reflect the level of ongoing or anticipated activities within each WSA.

7. BLM will take all actions necessary to ensure full compliance with the IMP. Every effort will be made to obtain voluntary compliance with the IMP by public land users. Where such efforts fail, BLM will promptly initiate additional appropriate action to achieve immediate compliance with the IMP. Violations will not be tolerated.

8. The BLM's policy is to attempt to immediately reclaim the impacts caused by any unauthorized action to a level as close as possible to the original condition, or at least to a condition that is substantially unnoticeable.

SPECIFIC POLICY GUIDANCE

This section describes how the BLM will apply the general policies set forth in Section A, above.

An overriding consideration before applying any of the policies below must be that the *preservation of wilderness values within a WSA is paramount and should be the primary consideration when evaluating any proposed action or use* that may conflict with or be adverse to those wilderness values. The concept of considering wilderness values first asserts, with few exceptions (e.g., valid existing rights, grandfathered rights, etc.), that wilderness resource management objectives within a WSA should take precedence over all other resource management program objectives. In other words, the wilderness resource will be dominant in all management decisions where a choice must be made between preservation of wilderness suitability and other competing uses.

Ideally, a decision to construct facilities within a WSA should be deferred until such time as Congress either designates the WSA as wilderness or releases it for

other purposes. If a facility must be constructed within a given geographic area, it would be in the best interest for protecting wilderness values to construct the facility outside the WSA. Other alternatives should always be considered before deciding to allow a use or activity within a WSA.

1. *Lands Under Wilderness Review.* The BLM conducted a wilderness inventory under procedures described in the *Wilderness Inventory Handbook*, issued by BLM on September 27, 1978 (Organic Act Directive No. 78-61). The inventory sorted lands into two categories: (a) WSAs, to which the IMP applies, and (b) lands determined not to have wilderness characteristics and not subject to the IMP. A complete study was conducted on all the identified WSAs and suitable/nonsuitable wilderness recommendations submitted by the Secretary to the President by January 1993. All of these WSAs remain under the IMP (except as noted in A.5 above) until a final decision is made by Congress. Lands being reviewed for wilderness values in future planning efforts are subject to the IMP once identified as a WSA and remain under IMP until either released by the State Director as nonsuitable or until a final decision is made by the Congress on the land's wilderness status.

2. *Nonimpairment.* BLM will review all proposals for uses and/or facilities within WSAs to determine whether the proposal meets the criteria below. Uses and/or facilities found to be nonimpairing may be permitted on lands under wilderness review. Uses and/or facilities found to be impairing will be denied.

The following criteria are referred to hereafter as the "nonimpairment criteria".

a. The use, facility, or activity must temporary. This means a temporary use that does not create surface disturbance or involve permanent placement of facilities *may* be allowed if such use can easily and immediately be terminated upon wilderness designation. "Temporary" means the use or facility may continue until the date the facility must be removed. "Surface disturbance" is any new disruption of the soil or vegetation, including vegetative trampling, which would necessitate reclamation. The term "surface disturbance" is discussed further in Specific Policy Guidance, Section 3 below. Decisions to allow or deny proposed actions based on the nonimpairment criteria will be included in appropriate decision documents.

b. When the use, activity, or facility is terminated, the wilderness values must not have been degraded so far as to significantly constrain the Congress's prerogative regarding the area's suitability for preservation as wilderness. The wilderness values to be considered are those mentioned in Section 2(c) of the Wilderness Act of 1964 (see Introduction, and/or Appendix B).

The only permitted exceptions to the above rules are:

(1) Emergencies such as suppression activities associated with wildfire or search and rescue operations;

(2) Reclamation activities designed to minimize impacts to wilderness values created by IMP violations and emergencies;

(3) Uses and facilities which are considered grandfathered or valid existing rights under the IMP;

(4) Uses and facilities that clearly protect or enhance the land's wilderness values or that are the minimum necessary for public health and safety in the use and enjoyment of the wilderness values; and,

(5) Reclamation of pre-FLPMA impacts.

3. *Surface Disturbance.* Surface disturbance is any new disruption of the soil or vegetation requiring reclamation within a WSA. Uses and facilities necessitating reclamation (i.e., recontouring of the topography, replacement of topsoil, and/or restoration of native plant cover) are definitely surface disturbing and must be denied. Cross-country vehicle use off boundary roads and existing ways is surface disturbing because the tracks created by the vehicle leave depressions or ruts, compact the soils, and trample or compress vegetation. Certain activities recognized as acceptable within a WSA, such as recreational hiking, use of pack stock, or domestic livestock grazing, are allowable within a WSA although in the strictest sense, they cause surface disturbance.

4. *Supporting Activities.* Some activities that in themselves are nonimpairing may require supporting facilities or activities that could impair wilderness suitability. (For example: A boat

launching ramp and associated parking as supporting facilities for boating, or the cross-country use of motor vehicles to retrieve sailplanes or hang gliders.) When this is the case, the supporting activity will be limited as necessary to meet the nonimpairment criteria. If the supporting activity cannot be done in a nonimpairing manner, then the principal activity will not be approved.

5. *Cumulative Impacts.* It is recognized that many minor impacts of nonimpairing uses or facilities could accumulate to a point at which the total impact would impair wilderness suitability either by creating impacts that overall are noticeable, or by degrading the area's wilderness values so far as to significantly constrain Congress's prerogative regarding the area's suitability for preservation as wilderness.

To prevent such cumulative impacts of ongoing uses from impairing wilderness suitability, the BLM will analyze and monitor the cumulative impacts. If impacts are becoming so great that the area's wilderness suitability could be impaired, the BLM will take steps to control those impacts by adjusting the conditions of use (such as time, place, and quantity), by prohibiting the expansion of the use, or by prohibiting the use altogether.

Every new proposal for uses or facilities, although individually it may be nonimpairing, will be analyzed in all required documents (i.e., National Environmental Policy Act (NEPA) documents, etc.) for cumulative effects. If the proposal will create an unacceptable additional

increment of impact (as described in the first paragraph of this section above), it will not be approved.

6. *Enhancing Wilderness Values.* Wilderness values were identified in Section 2(c) of the Wilderness Act of 1964. The BLM Wilderness Inventory Handbook (Organic Act Directive No. 78-61, dated 9/19/78) further defined wilderness values as: roadlessness, naturalness, solitude, primitive and unconfined recreation, size, and supplemental values. Actions that clearly benefit a WSA's wilderness values through activities that restore, protect, or maintain these values are allowable. Though they may enhance wilderness values, these allowable actions must still be carried out in a manner which is least disturbing to the site.

In order to determine whether a proposed action enhances wilderness values within a given WSA, one must refer to the original wilderness inventory for baseline or benchmark data concerning the particular wilderness value(s) being affected. During the wilderness inventory, the Bureau described in detail the state or condition of each wilderness value or characteristic. If the proposed action would result in a positive or beneficial change in the state or condition of the wilderness value(s) as described, assessed, or calculated on the date of approval of the intensive inventory, then the wilderness value would be enhanced by the proposed action. Conversely, if the proposed action would result in a negative or detrimental change in the state or condition of the wilderness value(s) then that wilderness

value would be degraded or impacted and the proposed action must not be allowed.

To illustrate this concept, the following examples are provided:

A mile-long drift fence is proposed in a particular WSA for the purpose of keeping livestock from entering an adjacent allotment. Because the fence did not exist at the time of the intensive wilderness inventory, it would result in a detrimental change in the baseline condition, thereby negatively impacting the wilderness value of "naturalness" and impairing the visitor's perception of the naturalness of the area. Consequently, the drift fence proposal must be denied because in this case wilderness values are not enhanced.

Conversely, if the fence is intended to correct or mitigate a situation which is degrading wilderness values identified in the intensive inventory, the fence construction project may be allowed. For example, domestic livestock and wild horses are altering a hot springs complex, a unique special feature of a WSA, by damaging riparian vegetation, harming an unusual aquatic community, and degrading water quality. Special consideration to design and location of an enclosure fence would be required to reduce impacts to scenic qualities. Any negative impacts to wilderness values created by this fence would be clearly offset by the positive benefits of protecting in a more natural condition a special feature of the wilderness resource.

There may be some circumstances that warrant a few permanent short gap fences or very small enclosures around springs as long as the benefits to wilderness values of having these structures clearly outweigh any negative impacts to naturalness or primitive recreation opportunities.

A guzzler is proposed within a certain WSA for the purpose of providing water to a resident population of bighorn sheep. It is clear the guzzler will negatively impact the wilderness value of "naturalness" because the guzzler did not exist at the time of the intensive inventory. If the guzzler is approved for construction within the WSA, the quality of "naturalness" is diminished as the immediate area becomes more affected by the forces of man rather than the forces of nature. The imprint of man's work becomes increasingly more noticeable and the WSA loses some of its primeval character. In essence, the WSA is no longer an area where the earth and its community of life are untrammeled (unimpeded or unhindered) by man and his activities. Unless specific circumstances and conditions in Chapter III apply, the guzzler must be denied.

We must ensure, therefore, in our consideration of any proposal to construct a guzzler or any other facility within a WSA, that the guzzler or other facility will not degrade the very wilderness values that initially qualified the area for designation as a WSA. While the proximity of bighorn sheep within a WSA enhances the wilderness experience, the existence of a guzzler within

Consequently, districts must make certain that the facilities or use associated with the supplemental values of ecological, geological, or other features of scientific, educational, scenic, or historical value, which normally add to the primary wilderness values of roadlessness, naturalness, solitude, primitive and unconfined recreation, and size, do not degrade these very values that initially qualified the area for designation as a WSA.

Section 603(c) of FLPMA states, "During the period of review of such areas and until Congress has determined otherwise, the Secretary shall continue to manage such lands according to his authority under this Act and other applicable law in a manner so as not to impair the suitability of such areas for preservation as wilderness." In other words, the WSA's wilderness values must not have been degraded so as to constrain or pre-empt Congressional designation authority.

7. *Existing Facilities.* Some lands under wilderness review may contain minor facilities that were found in the wilderness inventory process to be substantially unnoticeable. For example, these may include primitive vehicle routes ("ways") and livestock developments. There is nothing in this IMP that requires such facilities to be removed or discontinued. On the contrary, they may be used and maintained as before, as long as this does not cause new impacts that would impair the area's wilderness suitability.

8. *"Grandfathered" Uses.*

   a. General. Grazing, mining, and mineral leasing uses that existed on the date of approval

of FLPMA (October 21, 1976) may continue on lands under wilderness review in the same manner and degree as on that date, even if this impairs wilderness suitability. These are the "grandfathered" uses, protected by the "manner and degree" clause of Section 603(c) of FLPMA. These uses must be regulated to ensure that they do not cause unnecessary or undue degradation of the lands.

Although activities on mining claims on which a valid mineral discovery was made prior to October 21, 1976, may qualify as "grandfathered" uses, these claims qualify for a more liberal development standard under the policy for valid existing rights (see Section B.9, below).

b. Criteria. To be an "existing" use, the use clearly must have been taking place on the lands as of the date of approval of FLPMA (October 21, 1976). A "grandfathered" mineral use must have created *actual physical impacts* before that date. Existing grazing must have been authorized as of October 21, 1976. However, new grazing (e.g., change in numbers, kind, or class of livestock, or season of use), expanding the area authorized for grazing, or new facilities are not "grandfathered".

If a "grandfathered" use is acquired by a different owner, the new owner may continue the "grandfathered" use in the same place. A "grandfathered" use is not an absolute right or privilege that can be uprooted from one land area and applied to a different land area;

it is based on the place where it was being conducted as of October 21, 1976.

The benchmark for the "manner and degree" of an existing use is the physical and visual impact that use was having on the area or impacts that occurred on October 21, 1976, because it is that impact that would have affected the wilderness review.

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10. *Appropriation Under the Mining Laws.* A mandate in Section 603(c) of FLPMA, that lands under wilderness review continue to be subject to appropriation under the mining laws, is a prohibition against withdrawal of lands under wilderness review from appropriation under the mining laws for the sole purpose of preserving the land's wilderness character. Lands under wilderness review will therefore remain open to appropriation under the 1872 Mining Law except: (a) lands that had been withdrawn from appropriation prior to the date of approval of FLPMA (October 21, 1976), and (b) lands withdrawn after October 21, 1976, for reasons other than preservation of their wilderness character.

11. *Motor Vehicles, Aircraft and Mechanical Transport.* Motor vehicles and mechanical transport may be allowed off boundary roads and existing ways for these purposes only:

a. in emergencies and search and rescue operations (as described in Section 12, below);

b. for official purposes by the BLM and other Federal, State, and local agencies and their agents when necessary and specifically

authorized by the BLM for protection of human life, safety, and property; for protection of the lands and their resources; and,

c. to build or maintain structures and installations authorized in this document, as long as such use of vehicles is determined to satisfy the nonimpairment criteria and is only along routes authorized and specified by the BLM. No grading, blading, or vegetative disturbance will be permitted as this would constitute surface disturbance and thus not meet the nonimpairment criteria.

In emergencies, cross-country travel will not be held to the nonimpairment standard; but in all other cases, cross-country travel is allowed only where it is specifically authorized by BLM and it satisfies the nonimpairment criteria. If impacts threaten to impair the area's wilderness suitability, the BLM may limit or close the affected lands to the uses causing the problem.

Mechanical transport, including all motorized devices as well as trail and mountain bikes, may only be allowed on existing ways and within "open" areas that were designated prior to the passage of FLPMA (October 21, 1976). Use of such devices off existing ways and trails are allowed only for the purposes listed in the paragraph above.

Helicopters may land on existing heliports, helispots, and on unimproved sites as long as the nonimpairement criteria is satisfied. Fixed-wing aircraft may land only on existing

airstrips or established vehicle ways as long as the nonimpairment criteria is satisfied. No new landing facilities may be built. In the case of an emergency, see Section 12 below.

Examples of aircraft landings that first must meet the nonimpairment criteria and be approved by the BLM, include informational gathering, surveys, surveillance or monitoring, placement or maintenance of projects, animal damage control, access, or transport. Examples of aircraft landings for emergency situations include search and rescue, law enforcement and fire suppression (refer to Section 12 below).

12. *Emergencies.* In emergencies such as fire or flood, any action necessary to prevent loss of life or property may be taken, even if the action will impair wilderness suitability. This may include search and rescue operations in cases of lost or injured persons, or removal of the deceased. Emergency actions will be conducted in the manner that least impairs wilderness suitability, and the resulting impacts will be reclaimed as soon as possible after the situation has ended. Within 7 days after the emergency action is completed, a record of the circumstances and the action taken will be placed in the WSA case file and a public notification will be mailed to all interested parties.

13. *Maintenance.* Existing facilities may be maintained to keep them in an effective, usable condition. Maintenance will not be allowed to modify a structure or installation to a condition that would impair the area's suitability for

wilderness designation. Measures required to carry out maintenance work will be allowed if these measures do not in themselves impair wilderness suitability. Maintenance of "grandfathered" livestock developments will be permitted to insure that the usefulness of the project for its intended purposes may be realized, but will not be allowed to modify a facility to exceed the physical and visual impacts existing on October 21, 1976. Modifications exceeding this standard will be evaluated under the nonimpairment standard. Maintenance of a facility that qualifies as a VER should also be held to the nonimpairment standard, unless that would unreasonably interfere with the rights granted under the VER.

14. *Air Quality.* Under the Clean Air Act (as amended, 1977), all BLM-administered lands were given Class II air quality classification, which allows moderate deterioration associated with moderate, well-controlled industrial and population growth. The BLM will continue to manage WSAs as Class II.

The Department of the Interior will not recommend reclassification to the more strict Class I in connection with future wilderness recommendations resulting from the BLM wilderness review. The two processes are separate and distinct, and are accomplished under two different laws, FLPMA and the Clean Air Act. Recommendations for wilderness designation are made by the BLM through the Secretary of the Interior and the President to Congress. Air quality reclassification is the prerogative of the

States, and it must follow a process mandated by the Clean Air Act Amendments of 1977, involving a study of health, environmental, economic, social, and energy effects, a public hearing, and a report to the Environmental Protection Agency. The Department will not recommend any change in air quality classification as part of wilderness recommendations.

15. *Pre-FLPMA Management.* Some lands under wilderness review, particularly among the instant study areas, were subject to more strict protection prior to approval of FLPMA than the IMP requires. For instance, some areas were withdrawn from mineral entry. In these cases, any use will be controlled by the more strict protection of the wilderness resource, regardless of whether that is provided by the IMP or by a pre-FLPMA withdrawal or regulation that is still in effect.

16. *New Discretionary Uses.* To foster efficient wilderness management, it is BLM's policy to minimize the establishment of new discretionary uses in WSAs that would be incompatible with possible wilderness designation, even when the uses would not in themselves exceed the nonimpairment standard. Some new uses, within or adjacent to WSAs, may create conflicts with management and preservation of wilderness values at a later time. Consideration should be give to the possible effect these uses may have on managing the WSAs as wilderness in the future. For example, the construction of a campground facility adjacent to a WSA would seem to have the potential to create conflicts

with management and preservation of wilderness values at a later time. Another example might be opening up a river or other body of water in a WSA to motorboat use. New uses, if authorized, must be temporary.

17. *Substantially Unnoticeable.* Substantially unnoticeable means that an action must be so insignificant as to be only a very minor feature or is not distinctively recognizable by the average visitor as being human made or human-caused because of age, weathering or biological change. The Bureau's visual contrast rating process (BLM Manual Section 8431, and the Contrast Rating Worksheet, Form 8400-4) may be used as an aid in determining whether the impacts of a proposed action are substantially unnoticeable. Other analysis that could be used, include a viewshed or seen–area analysis and the use of ground and aerial photographs. In all cases a written narrative analyzing the potential visual impacts, both individually and cumulatively, must be provided.

18. *Minimum Tool Concept.* The "minimum tool" concept relates to the management of designated wilderness areas, but the concept can be useful as a guide when applied to the interim management of WSAs. Under the "minimum tool" concept, managers should scrutinize every proposed action to determine if the action is necessary to protect the physical, biological, and cultural resources, as well as the quality of the wilderness experience. If the planned action is deemed necessary, it would be accomplished using methods and equipment that have the

least impact on the quality of an individual or group's wilderness experience, as well as the physical, biological, and cultural resources within the WSA. In a WSA, how one carries out management actions is as important as the end product.

For example, *if* a decision is made to develop a water source for bighorn sheep within a WSA because this would enhance wilderness values, and the preference is for construction of a bighorn sheep guzzler, management should first consider and analyze other "minimum tool" alternatives that would accomplish the same management objectives with less degradation to wilderness values. Some possible minimum tool options in this example might include:

a. Restoration of existing springs and seeps that have been altered by domestic livestock grazing or wild horses and burros;

b. Removal of domestic livestock or wild horses and burros from water sources frequented by bighorn sheep;

c. Designing a very short, substantially unnoticeable fence that would segregate bighorn sheep from livestock and wild horses and burros in order that all may share the same water source;

d. Elimination of salt cedar infestations that may have reduced or eliminated the above-ground flow of water available to bighorn sheep;

e. Constructing one or more small slick rock, concrete and rock catchments or dams; and,

f. Upgrading of potholes for greater water-holding capacity by utilizing native stone and tinted concrete.

19. *Hazardous Materials.* No hazardous wastes, substances, or materials (see Glossary for complete definitions) may be sued, stored, or disposed of in WSAs. In emergency situations (e.g. the cleanup of unauthorized dumping of hazardous materials), any action necessary to protect visitor health and safety and to protect and natural environment may be taken, even if the action will temporarily impair wilderness suitability. Emergency control and cleanup activities will be conducted in accordance with all pertinent laws and regulations, NEPA requirements, and in the manner that least impairs wilderness suitability. Impacts resulting from hazardous materials cleanup will be reclaimed as soon as possible after disposal and/or cleanup operations have ended. Public notification procedures will be followed for all hazardous materials operations in WSAs.

CHAPTER II. IMPLEMENTATION OF THE INTERIM MANAGMENT POLICY

A. USES OR FACILITIES SUBJECT TO THE IMP

To determine whether a proposed use or facility is subject to the IMP, the following question must be considered regarding the affected lands: Does the use or facility involve public lands identified by the BLM as a WSA? If so, the IMP will apply. Proceed with the evaluation described in Section B, below. If the above criteria does not apply, then the use or facility is not subject to the IMP.

B. PROCEDURES FOR EVALUATION OF PROPOSED ACTIONS

1. *Step 1 – Review the Definition of Wilderness.* Before beginning any evaluation of a proposed action within a WSA, review the primary mandates and definitions of wilderness in Section 2 of the Wilderness Act of 1964. There are some key phrases in the definition that will assist in understanding the intent of Congress that guide the IMP:

   — an area where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain. (Note: "untrammeled" means unconfined, unrestrained, or unimpeded.)

   — an area of undeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habitation.

   — protected and managed so as to preserve its natural conditions.

   — generally appears to have been affected primarily by the forces of nature, with the imprints of man's work substantially unnoticeable.

2. *Step 2 – Consider Exceptions and Limitations to the Nonimpairment Standard.* Consider whether the proposal is covered by one of the exceptions or limitations to the "nonimpairment" standard:

   a. Does the proposal qualify as a "grandfathered" mineral or grazing use continu-

ing in the same manner and degree as on October 21, 1976? New proposed range developments, for example, are not grandfathered. (Consult the applicable policies in Chapter I.B.8 and Chapter III.B and D.) If so, the proposal will probably be considered acceptable under the IMP subject to regulation ensuring that the use or facility does not cause unnecessary or undue degradation. In many grandfathered developments that predate the NEPA, no environmental documentation exists. Some mitigation to impacts on wilderness values may be identified during the environmental assessment process.

b. Is the proposal part of the development of a valid existing right (such as a valid mining claim, mineral lease, or right-of-way authorization in effect as of October 21, 1976)? If so, proceed under the applicable policies in Chapter I.B.9, III.A.2 and 4, and III.B. The right will be recognized but it is not absolute. The scope of a valid existing right depends on any conditions, stipulations, or limitations stated in the law or approval document that created the right.

c. In a WSA that is being studied under Section 202 of FLPMA, is the proposal a mining activity under the 1872 Mining Law? If so, the activity will be regulated under 43 CFR 3802 to prevent unnecessary or undue degradation of the lands but not the nonimpairment criteria.

The determination that a proposal is not subject to the nonimpairment standard will be documented and recorded in appropriate case files and/or included in any decision documents and authorizations.

3. *Step 3 – Notify the Public.*

   a. All offices must notify interested parties of proposed actions on land within their jurisdiction that are managed under the IMP before such actions can be approved. If appropriate, such notifications should be sent directly to the interested parties. Use of the Federal Register or the "legal notices" section of newspapers is permissible, but such formally published notices by themselves are not enough.

   b. Proposed actions on lands subject to the IMP requiring notification procedure include but are not limited to:

      — requests for approval of mining plans of operations under 43 CFR 3802;

      — gathering information about mineral resources in accordance with 43 CFR 8560.4-5(b);

      — applications for permit to drill;

      — notices of intent to conduct oil and gas exploration operations on existing leases;

— proposed changes in livestock use, including changes in numbers, season of use, or kinds or classes of livestock; and,

— BLM-initiated projects, including implementation of decisions contained in land use and activity plans.

— Public initiated projects such as issuance of a filming permit.

It is not necessary to send notices on extensions of existing mineral leases.

c. Provide notice at least 30 days prior to making a decision on *all* proposals (regardless of the method of analysis or determination), except when it is not possible to do so because of emergency conditions or other regulatory timeframes, e.g., 43 CFR 3802. If public response indicates more time is required, the approval period may be extended, depending upon the situation and at the discretion of the authorized officer. Notifications should be sent early enough to provide recipients sufficient time to inform BLM of their concerns prior to the date we intend to authorize or carry out the proposed action.

d. The notice should include a map and enough information for the recipient to understand the purpose, location, nature, size and expected implementation date of the proposed action. Although not required, it may be helpful to include, a copy

of the Environmental Analysis (EA) or the IMP nonimpairment analysis with the notice.

e. The level of interest expressed and issues raised in scoping the EA or Environmental Impact Statement (EIS) will determine the interpretation of the significance of the project and how widely to circulate notices. States may wish to use a State Office clearinghouse approach in reviewing, summarizing and notifying interested citizens or organizations in addition to direct notifications.

f. Notification of unauthorized actions that have caused surface disturbance in WSAs is also required. Such notices are not intended to delay or impede timely enforcement or reclamation of the area. In order to protect evidence and specific information on an alleged violator, certain information may be withheld pending disposition of any administrative or legal remedies.

4. *Step 4 – Conclude Whether the Use or Facility Will Meet the Nonimpairment Standard.* Conclude and provide written documentation whether the proposal is in compliance with the nonimpairment criteria from Chapter I and what impacts it will have on wilderness values. Written documentation must be recorded in appropriate case files and included in any decision documents and authorizations. The BLM field officials will cooperate with applicants to help identify

ways by which a proposal can be brought into compliance with the nonimpairment criteria through modification of the proposal.

5. *Step 5 – Consult the Guidelines for Specific Activities.* Chapter III of this handbook contains guidelines and special exceptions for many of the specific uses and facilities which may take place or be proposed in Wilderness Study Areas. Consult these guidelines for specific policy guidance covering the use or facility. If specific guidelines do not address the proposal being evaluated, refer to the "nonimpairment criteria" from Chapter I and other applicable policies that may apply in this particular case.

6. *Step 6 – Gather Information; Prepare EA or EIS.* The information needed to reach conclusions on whether the proposal meets the nonimpairment criteria (Step 4) will be recorded in the EA or EIS that is prepared at this stage in the analytical process. The EA or EIS must include the information outlined below in paragraphs a, b, c, and d, most of which is already required by the NEPA Handbook (H-1760-1). The use of categorical exclusion reviews for uses and facilities on lands under wilderness review is not allowed.

The information required in an EA or EIS must include the following as a minimum, and where required by the Council on Environmental Quality (CEQ) regulations:

a. A precise description of the proposal and its alternatives, including:
   - — Purpose, need, and/or justification for the action.
   - — Exact location and proposed time of the action.
   - — Discussion of all alternative sites both inside and outside the WSA.
   - — Discussion of all reasonable alternative methods or approaches to accomplishing the same management objectives. Alternatives must be described with the same level of detail as the proposed action.
   - — Proposed facility design specifications, if applicable, including size, color and materials.
   - — Construction methods including machinery, equipment or vehicles to be used.
   - — Miles, square feet, or acres of soil and vegetation disturbance.
   - — Access required for proposed action and alternatives.
   - — Maintenance schedules, techniques, procedures, and required access.

b. A description of the affected environment, considering both the specific site and the WSA in its entirety:

   — Wilderness characteristics as documented in the intensive inventory report or Wilderness Study Report.

   — Meaningful descriptions of soils, erosion potential, vegetation cover and composition, other resources, reclamation potential, topography and climate (including precipitation).

   — A description of the natural ecosystem including dominant plants and animals.

   — Existing uses and facilities.

   — Discussion of scenery characteristics, vistas, key viewing areas, and visitor use areas.

c. Written assessment of anticipated impacts including the following, if applicable:

   — Describe the physical, biological, cultural, and environmental impacts to the site or WSA.

   — If the project's impacts, including cumulative impacts, had existed at the time of the intensive inventory, would those impacts have disqualified the area, or any portion of the area, from being identified as a WSA or from being included in a WSA?

   — Discuss how the proposed project will (or will not) conform to the nonimpairment criteria as described in Chapter 1.

   — Discuss how the proposed project will (or will not) meet the conditions of being substantially unnoticeable. Consider the impacts of existing, as well as proposed and future projects on the condition of being substantially unnoticeable.

   — Will the addition of this proposal produce an aggregate negative effect upon the area's wilderness characteristics and values that would constrain Congress's decision to designate the area as wilderness, considering the condition of the area at the time the Secretary sent the recommendation to the President? The analysis must include, if applicable, the impact of the proposal on the following wilderness and related values:

   - soil stability, including erosion impacts.

   - condition or trend of the vegetation including plant species composition and vegetal cover.

   - natural biological diversity including numbers and species

composition of microbes, invertebrates, fish, reptiles, amphibians, birds, and mammals.

- key visual resource characteristics (form, line, color, and texture) of the landscape.
- naturalness.
- opportunities for solitude.
- opportunities for primitive and unconfined types of recreation, or quality of exiting opportunities for primitive and unconfined types of recreation.
- description of special features.
- quality of surface water including dissolved solids, nutrient levels such as nitrates, and microbial concentrations.
- threatened or endangered plant and animal species.

— Will the addition of this proposal reduce or improve the overall wilderness quality of the WSA or a portion of the WSA? (This is especially important for WSAs or portions of WSAs that are pristine in character.)

d. Analysis of reclamation for unauthorized projects:

— Discussion of what the particular reclamation plan will accomplish.

— How the process will be implemented (type and amounts of hand and equipment work).

— Soils to be replaced and/or recontoured to a natural appearance.

— Vegetation to be reestablished.

— Schedule.

— Probability for success.

— If a reclamation plan is not available or is inadequate, assess what measures would be needed to return the disturbed areas to the required reclamation level.

7. *Step 7 – Decision/Record Keeping.* The determination to allow or deny the proposed action and whether the action complies with the IMP or with the 3802 regulations (for those actions covered under these regulations), must be included in the decision document and recorded in appropriate case files and official WSA files, which are maintained at the appropriate office level. In addition to the required inventory and WSA information, this file or a separate IMP file should contain a summary or cross-reference of other case files of all authorized, unauthorized, and proposed actions, since December 1979, within the WSA, including

all related NEPA documents. The file must contain the following information for any individual proposed use, facility, or unauthorized action:

a. The WSA name and number.

b. A brief description of the proposed use or facility.

c. An accurate map of the proposal.

d. A description of action taken and authorized uses and facilities (i.e. approved, disapproved, pending). A description of uses and facilities believed to be unauthorized.

e. A cross-reference to the pertinent case files, decision rationale, bonding determination, documentation required in Chapter II.B and the name of the staff member handling the case.

f. Comments on problems encountered.

g. Chronology of events.

h. Reclamation schedule.

i. Evaluation of reclamation efforts.

j. Current status of the proposal or investigation.

k. Future planned actions.

All subsequent compliance, noncompliance and follow-up actions must be documented in the file.

C. DECISIONS AND APPEALS

Appeal procedures can be found in 40 CFR Part I and regulations governing program decision in the appropriate CFRs. Appellants and others who are adversely affected by a management decision within lands under wilderness review will be informed of appeal procedures.

D. MONITORING AND SURVEILLANCE

1. All WSAs are to be monitored on a minimum standard of surveillance that will insure compliance with the IMP. A basic monitoring level of at least once per month during the months the area is accessible by the public should be adhered to, or more frequently if necessary because of potential use activities or resource conflicts.

2. Alternative surveillance schedules for any WSA that could more effectively be monitored less frequently than once per month can be used if approved by the State Director. In the absence of an approved alternate surveillance schedule, the minimum standard of surveillance of once per month shall remain in effect.

   Alternate surveillance schedules shall be tailored for the special needs of the WSA based on a consideration of factors including but not limited to: location and proximity to user publics, history of unauthorized activities and violations, weather/seasons of use and access, potential for volunteer assistance,

Adopt-a-WSA efforts, or other staff extensions/outreach opportunities.

At a minimum, the alternate surveillance schedule shall include the frequency of ground and air surveillance, the resources required to sustain the new schedule, and a justification for replacing once a month surveillance with the alternate schedule. The alternate surveillance schedule for each WSA must be approved and maintained in the WSAs permanent documentation file.

3. If possible, BLM District Offices should submit monthly written reports to the State Office, keep patrol logs, and make use of surveillance plans, diaries, and photographs. Unauthorized uses and facilities may be assertively prevented by using such measures as: ranger patrol, cooperative agreements with local law enforcement agencies, surveillance by volunteers, posting signs at key access points, notifying various user and commodity groups of WSA locations, and regular project compliance visits to monitor actions authorized within WSAs.

E. ENFORCEMENT

If unauthorized uses and facilities result in surface disturbance or other degradation of the area's suitability for preservation as wilderness, legal action will be initiated as appropriate to obtain full reclamation of the area. Impacts resulting from unauthorized activities will not disqualify an area from WSA status. All action to achieve compliance with the IMP will be

initiated pursuant to existing regulations governing the noncomplying activity.

In addition to normal enforcement procedures, the following additional steps must be taken whenever a District Manager believes a use is taking place or an unauthorized facility is being constructed on lands under wilderness review that is not in compliance with the IMP or the regulations of 43 CFR 3802:

1. Thoroughly inspect the site and determine whether the use or facility is authorized or unauthorized. Dertemine whether the use or facility is permissible on the basis of "grandfathered" uses or valid existing rights. A trespass operation must stop, even if it qualifies as "grandfathered" or a VER, until NEPA review is complete and proper authorizations are issued.
2. Immediately contact the person responsible for the activity in any manner that can be verified with documentation. Explain the situation and, depending on the situation or activity, seek the responsible person's assistance in bringing the operation into compliance with the IMP. Document the "who, what, where, when, how, and why" of the activities observed.
3. If the responsible person is not willing to comply, and the operation is causing impairment of wilderness values, the BLM will shut down the operation. Notices of noncompliance and citations may be used. When appropriate, the full range of administrative remedies will be used before initiating legal

action. The State Director will be notified, after coordination and consultation with the responsible person, so that additional appropriate action may be taken immediately to prevent impairment. The BLM will work with the Regional Solicitor and U.S. Attorney's office to initiate appropriate legal action if necessary.

Section 303 of FLPMA provides that the use, occupancy, or development of any portion of the public lands contrary to any regulation of the Secretary, or other responsible authority, or contrary to any order issued pursuant to any such regulation, is unlawful and prohibited. Use and facilities contrary to the provisions of the IMP and the regulations 43 CFR 3802 would be unlawful, and criminal provisions of FLPMA [43 USC 1733(a)] may apply. Regulations codified at 43 CFR 8360 provide the basis for criminal prosecution, which is independent of any administrative remedies. Possible violations of criminal law should be referred to the law enforcement ranger or special agent, who will take the appropriate action. Criminal prosecution is pursued regardless of the type of IMP violation if circumstances warrant it.

F. RECLAMATION OF UNAUTHORIZED IMPACTS

The BLM's goal is to immediately reclaim the impacts caused by any unauthorized action to a level as close as possible to the original condition, or at least to a condition that is substantially unnoticeable. The BLM will attempt to collect costs of reclamation from any and all persons responsible for causing impacts. If the

person responsible for the unauthorized impacts is not known, BLM will undertake reclamation and initiate action to locate the person(s) responsible and collect the reclamation costs from these persons. If the person responsible for the unauthorized impacts is known but unwilling to perform the needed reclamation, BLM will undertake reclamation and initiate action to collect the costs from the responsible person(s). If the impacts in a particular case are so severe as to make it impossible or unreasonably costly to meet the requirements of the nonimpairment criteria, or if reclamation efforts would result in greater loss of wilderness values than natural reclamation, the State Director will submit written recommendations to the Director proposing an alternative reclamation strategy.

* * * *

H. RECREATION

Most recreational activities (including fishing, hunting and trapping) are allowed on lands under wilderness review. However, some activities may be prohibited or restricted because they require permanent structures or because they depend upon cross-country use of motor vehicles (for example: pickup vehicles for balloons or sailplanes).

BLM will analyze the magnitude of all recreational activities to ensure that such use will not cause impacts that impair the area's wilderness suitability. An example might be erosion caused by increased vehicle travel within a WSA. To prevent this impairment, the BLM will monitor ongoing recreation uses as well as cumulative impacts, and if necessary, adjust the time, location, or quantity of use or prohibit that use in the impacted area.

To encourage responsible use of WSAs and to promote a proper outdoor ethic, the BLM will promote "Leave No Trace" and "Tread Lightly" program philosophies. The "Leave No Trace" program aims to educate and promote non-impacting use of wildlands by visitors participating in non-motorized recreational activities. "Tread Lightly" programs promote the environmentally responsible use of off-highway vehicles. The BLM will take advantage of both programs when making management decisions and promoting public use and enjoyment of WSAs.

1. No new, permanent recreational ways, trails, structures, or installations will be permitted, except those that are the minimum necessary for public health and safety in the use and enjoyment of the public lands' wilderness values, *and* that are necessary to protect wilderness resource values. No mechanical transport, which includes all motorized vehicles plus trail or mountain bikes, will be allowed on such trails.

   Facilities necessary for visitors' health and safety and to protect wilderness values may be provided in either of two ways:

   a. permanent facilities that are the minimum necessary for public health and safety in the use, enjoyment, and protection of wilderness values; or,

   b. temporary facilities that meet the nonimpairment criteria. These facilities will be installed so that they are substantially unnoticeable and minimize surface disturbance. Visual resources management

   concepts and techniques and wilderness specific designs will be used in the construction and siting of such facilities.

2. Hobby collecting of mineral specimens (rockhounding) and vegetative specimens may be allowed for personal but not commercial use, as long as the collection activity method meets the nonimpairment criteria.

3. Boating may be allowed with or without motors. The BLM does not have authority over all waters within the public lands; some are under jurisdiction of the States. Therefore the following guidelines apply only to those waters on which the BLM has authority to regulate boating.

   a. No waters will be closed to motorboats solely because they are in areas under wilderness review. However, if increasing impacts of boating (such as shore erosion or water pollution) threaten to impair wilderness suitability, the BLM may close the affected waters to motorboats. In some cases, time or space restrictions or public education may make a total closure unnecessary. The Bureau also has authority under other programs to regulate boating to minimize damage to wildlife and other resource values.

   b. River running, with or without motors, may be permitted. Cumulative impacts on river campsites will be monitored to prevent impairment of wilderness suitability.

c. No permanent launching ramps or boat docks will be built. A "brow log" may be used to reduce erosion at boat landings. Temporary launching ramps and boat docks may be installed only if they satisfy the nonimpairment criteria.

4. Environmental education and interpretive programs may be conducted so long as no permanent facilities are required and the use does not cause surface disturbance.

5. Camping may be allowed. Camping with recreational vehicles may occur on existing ways as long as this use meets the nonimpairment criteria. Primitive campsites for recreational use may be established anywhere in the WSA as long as they meet the nonimpairment criteria. Low impact camping techniques should be encouraged within all WSAs.

6. Cross-country skiing may be allowed. Downhill (alpine) may be permitted only if any support facilities within the WSA satisfy the nonimpairment criteria. Helicopter skiing, if nonimpairing, may be allowed at the discretion of the authorized officer.

7. Aerial activities such as ballooning, sailplaning, hang gliding, and parachuting (sky diving), may be allowed as long as they do not require cross-country use of motorized vehicles or mechanical devices to retrieve equipment, *except* in areas designated as "open" before October 21, 1976.

8. Recreational gold dredging and panning, when conducted without location of a mining claim may be allowed as long as it is done in a manner that satisfies the nonimpairment criteria. If the activity would cause significant damage to fish spawning or rearing areas, it will be considered to impair wilderness suitability, and the activity will be controlled to prevent such impacts.

9. Concessions and actions that require authorization under a special recreation permit will be allowed only if the use and related facilities satisfy the nonimpairment criteria. Examples that may qualify include mobile refreshment stands, river trip outfitters, guides, and providers of pack animals and saddle horses.

10. Rock climbing and caving will be allowed as long as these activities meet the nonimpairment criteria. The use of power driven (i.e. fuel or electric) rock drills or permanent anchors (e.g. bolts) is not allowed. No marring, scarring or defacing resulting in adverse impacts to the wilderness value of naturalness will be permitted, nor will permanent installations be permitted. Exceptions to the above may be allowed for: (a) emergencies, such as search and rescue operations; and (b) authorized actions needed for access travel within WSAs which are the minimum necessary for public health and safety in the use and enjoyment of the wilderness values. Any impacts from emergency actions (a, above), must be reclaimed to a substantially unnotice-

able condition following the emergency situation.

11. Except for emergency situations as defined in Chapter I.B.12, vehicle designations in WSAs are to be handled through the land-use planning process. Until WSAs are designated as wilderness or released from study status, vehicle use within each WSA is governed by the terms and conditions as identified in Chapter I.B.11 and any land-use planning decisions. Open areas may be designated only: (1) as sand dune or snow areas for use by the appropriate sand or snow vehicles, or (2) where an area was designated open prior to October 21, 1976. *No vehicle designation in a WSA may allow vehicles to travel off existing ways and trails, except in these two circumstances.*

12. Organized vehicle events will not be allowed unless they can meet the nonimpairment criteria, and are contained on existing ways and trails or within pre-FLPMA sand dune or snow open areas. (For clarification of definitions of applicable vehicles and designation of areas see guidance contained in 43 CFR 8340 and 1601.)

I. CULTURAL AND PALEONTOLOGICAL RESOURCES

Cultural and paleontological resource inventories, studies, and research involving surface examination may be permitted if they satisfy the nonimpairment criteria. Salvage of archeological and paleontological sites; rehabilitation, stabilization, reconstruction, and

restoration work on historic structures; excavations; and extensive surface collection may be permitted if the specific project satisfies the nonimpairment criteria.

Permanent physical protection, such as fences, will be limited to those measures needed to protect resources eligible for the National Register of Historic Places and will be constructed to be substantially unnoticeable.

J. FIRE MANAGEMENT

The BLM will conduct all prescribed fire and suppression activities in accordance with fire management activity plans and subsequent operational plans (prescribed fire and preattack) for all WSAs, using caution to avoid unnecessary impairment of an area's suitability for preservation as wilderness. "Light-Hand-On-The-Land" fire suppression tactics will be used. Fire is a natural component of many wilderness ecosystems and fire plans need to give serious consideration to this fact before recommending one fire management technique over another. Resource area advisors will use the fire plans in making decisions during emergency fire situations and prescribed ignitions. All uses of earth moving equipment within a WSA require authorization. Priority for placement of large fire camps should be outside WSAs. Use of motorized vehicles and mechanical equipment during mop-up should be minimized.

The fire preattack plan covering a WSA will specify the fire management objectives and special considerations for each WSA, taking into account a number of factors including the existing wilderness characteristics of the area, the need to prevent impairing actions, historic fire occurrence, the natural role of fire, proposed degree of suppression, expected fire behavior, acceptable suppression techniques, adequate buffer zones, smoke

management, effect on private or other agency inholdings and on adjacent landowners, the limits of acceptable fire weather, fire behavior, fire effects, and the access requirements of other agencies. In planning firebreaks, the use of natural firebreaks and existing roads is encouraged. Emergency fire rehabilitation measures will continue to be carried out under guidelines in Handbook H-1742-1 and Manual Section 1742. Efforts should be made to rehabilitate any impacts created by suppression activities prior to releasing fire crews and associated equipment following fire containment.

* * * *

GLOSSARY OF TERMS

Some of [t]he terms used in this handbook have specific meanings and are defined as follows:

- C -

cross-country: refers to travel that is not on existing access routes (ways, trails, boundary roads) and involves surface disturbance caused solely by the passage of vehicles.

cumulative impact: the aggregate impact of existing and proposed activities. Individual intrusions when considered by themselves may not impair wilderness suitability; however, when combined with other existing and proposed substantially unnoticeable impacts, the total effect may be sufficient to impair an area's suitability for preservation as wilderness.

-E -

enhance wilderness values: an action that clearly benefits a wilderness study area's wilderness value through

activities that restore, protect, or maintain these values. Wilderness values are those identified in section 2(c) of the Wilderness Act of 1964, including: roadlessness, naturalness, solitude, primitive and unconfined recreation, and size.

existing way: a way (see definition) existing on the date of the initial wilderness inventory.

- F -

FLPMA: the Federal Land Policy and Management Act of 1976 (Public Law 94-579, 90 Stat. 2743, 43 USC 1701).

- H - -

hazardous materials: any substance, pollutant, or contaminant listed as hazardous under the Comprehensive Environmental Response, Compensation, and Liability (CERCLA) Act of 1980, as amended, 41 U.S.C. 9601 et seq., and any related regulations. Hazardous substances includes any hazardous waste as defined in the Resource Conservation and Recovery (RCRA) Act of 1976, as amended, 42 U.S.C. 6901 et seq., and related regulations. Hazardous materials includes any nuclear or byproduct material as defined by the Atomic Energy Act of 1954, as amended, 42 U.S.C. 2011 et seq. In general, hazardous substance as defined in CERCLA is any substance that the Environmental Protection Agency (EPA) has designated as hazardous, dangerous, or toxic under the Clean Air Act, 42 U.S.C. 7401 et seq., the Clean Water Act, 33 U.S.C. 1251 et seq., or the Toxic Substances Control Act, 15 U.S.C. et seq., as well as any hazardous waste under RCRA.

- I -

impact: the effect, influence, alteration, or imprint of an activity.

impair: to diminish in value or excellence.

impair wilderness suitability: refers to activities that are considered to impair an area's suitability for preservation as wilderness—i.e., that do not satisfy the "nonimpairment criteria" set forth in Chapter I.B.2 of this handbook.

instant study area: one of the 55 primitive and natural areas formally identified by BLM through a final action published in the *Federal Register* before November 1, 1975. FLPMA required an accelerated wilderness review of these areas.

- M -

mining claim: any unpatented mining claim, millsite, or tunnel site authorized by the United States mining laws.

multiple use: ". . . the management of the public lands and their various resource values so that they are utilized in the combination that will best meet the present and future needs of the American people; making the most judicious use of the land for some or all of these resources or related services over areas large enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions; the use of some land for less than all of the resources; a combination of balanced and diverse resource uses that takes into account the long-term needs of future generations for renewable and non-renewable resources, including, but not limited to, recreation, range, timber, minerals, watershed, wildlife

and fish, and natural scenic, scientific and historical values; and harmonious and coordinated management of the various resources without permanent impairment of the productivity of the land and the quality of the environment with consideration being given to the relative values of the resources and not necessarily to the combination of uses that will give the greatest economic return or the greatest unit output." (From Section 103, FLPMA.)

- N -

negligible: so small or unimportant or of so little consequence as to warrant little or no attention; not exceeding established standard(s).

- P -

pre-FLPMA: before October 21, 1976, the date of approval of the Federal Land Policy and Management Act.

primitive and unconfined recreation: nonmotorized and undeveloped types of outdoor recreational activities.

public lands: for the purpose of the wilderness review program, any lands and interest in lands owned by the United States within the several States and administered by the Secretary of the Interior through the Bureau of Land Management, without regard to how the United States acquired ownership, except:

1. Lands where the United States owns the minerals but the surface is not Federally owned.
2. Lands being held for the benefit of Indians, Aleuts, and Eskimos.

3. Lands tentatively approved for State selection in Alaska.
4. Oregon and California (O & C) grant lands that are managed for commercial timber production.

- R -

reclamation: the contouring of the topography to a natural appearance (not necessarily to the original contour), the replacement of topsoil, and the restoration of plant cover, if any, approximating the species composition and cover previously occurring on the disturbed site.

reclamation deadline: the date on which temporary post-FLPMA impacts within WSA's were to be reclaimed to a condition of being substantially unnoticeable before the Secretary was scheduled to send his recommendations on wilderness suitability or nonsuitability to the President. This date has past.

roadless: for the purpose of the wilderness review program, this refers to the absence of roads which have been improved and maintained by mechanical means to ensure relatively regular and continuous use. A way maintained solely by the passage of vehicles does not constitute a road. Words and phrases used in the above definition of "roadless" are defined as follows:

1. Improved and maintained: Actions taken physically by man to keep the road open to vehicular traffic. "Improved" does not necessarily mean formal construction. "Maintained" does not necessarily mean annual maintenance.
2. Mechanical means: Use of hand or power machinery or tools.

3. Relatively regular and continuous use: Vehicular use which has occurred and will continue to occur on a relatively regular basis. Examples are: Access roads for equipment to maintain a stock water tank or other established water sources; access roads to maintained recreation sites or facilities; or access roads to mining claims.

- S -

Section 202 Wilderness Study Area: a wilderness study area being studied under authority of section 202 of the Federal Land Policy and Management Act of 1976, which requires recurrent land-use planning by the Bureau of Land Management.

Section 603 Wilderness Study Area: a wilderness study area being studied under authority of section 603 of the Federal Land Policy and Management Act of 1976, which requires a wilderness review of the public lands.

solitude: 1. The state of being alone or remote from habitations; 2. A lonely, unfrequented, or secluded place.

substantially unnoticeable: refers to something that either is so insignificant as to be only a very minor feature of the overall area or is not distinctly recognizable by the average visitor as being manmade or man-caused because of age, weathering, or biological change. An example of the first would be a few minor dams or abandoned mine buildings that are widely scattered over a large area, so that they are an inconspicuous part of the scene. Serious intrusions of this kind, or many of them, may preclude inclusion of the land in a wilderness study areas. (See also "cumulative impact," above.) An example of the second would be an old juniper control

project that has grown up to a natural appearance, the old fallen trees largely decomposed.

surface disturbance: any new disruption of the soil or vegetation. Uses and facilities in a WSA necessitating reclamation (i.e., recontouring of the topography, replacement of topsoil, and/or restoration of native plant cover) are surface disturbing. Cross-country vehicle use off existing ways or boundary roads is surface disturbing because the tracks created by the vehicle leave depressions or ruts, compact the soils, and trample or compress vegetation.

- T -

temporary use: a use or activity that does not create any new surface disturbance (including no vegetative trampling), involve permanent placement of structures, and may not continue after the date of wilderness designation.

trail: a pathway usually created and maintained by human foot traffic, beasts-of-burden, livestock, or wildlife.

- U -

unnecessary or undue degradation: surface disturbance greater than what would normally result when an activity is being accomplished by a prudent operator in usual, customary, and proficient operations of similar character and taking into consideration the effects of operations on other resources and land uses, including those resources and uses outside the area of operations. Failure to initiate and complete reasonable mitigation measures, including reclamation of disturbed areas, or creation of a nuisance, may constitute unnecessary or undue degradation. Failure to comply with applicable environmental protection statutes and regulations

thereunder will constitute unnecessary or undue degradation.

- V -

VER: Valid Existing Right.

- W -

way: a trace maintained solely by the passage of vehicles which has not been improved and/or maintained by mechanical means to ensure relatively regular and continuous use.

wilderness: the definition contained in Section 2(c) of the Wilderness Acc of 1964 (78 Stat. 891). (See Appendix B for its full text.)

wilderness area: an area formally designated by Congress as part of the National Wilderness Preservation System.

wilderness characteristics: the definition contained in section 2(c) of the Wilderness Act of 1964 (78 Stat. 891). (See Appendix B for its full text.)

wilderness inventory: an evaluation of the public lands in the form of a written description and map showing those lands that meet the wilderness criteria as established under Section 603(a) of FLPMA and Section 2(c) of the Wilderness Act, which will be referred to as wilderness study areas (WSA'S). (See *Wilderness Inventory Handbook*, dated September 27, 1978, Organic Act Directive No. 78-61.

Wilderness Review Program: the term used to cover the entire process of wilderness inventory, study, and reporting or the wilderness resource, culminating in recommendations submitted through the Secretary of the Interior and the President to Congress as to the

suitability or nonsuitability of each wilderness study area for inclusion in the National Wilderness Preservation System. (For a summary of the program, see Appendix C.)

Wilderness Study Area (WSA): a roadless area or island that has been inventoried and found to have wilderness characteristics as described in Section 603 of FLPMA and Section 2(c) of the Wilderness Act of 1964 (78 Stat. 891).

UNITED STATES DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
WASHINGTON, D.C. 20240
http://www.blm.gov

July 13, 1999

In Reply Refer To:
8560 (240) N

EMS TRANSMISSION 07/13/99

Information Bulletin No. 99-181

To: All Field Officials

From: Director

Subject: Off Highway Vehicle Use in Wilderness Study Areas

In the Federal Land Policy and Management Act, Congress has given the Bureau of Land Management (BLM) a clear mandate regarding the protection of lands under wilderness review. Section 603 (c) states "During the period of review such areas and until Congress has determined otherwise, the Secretary shall continue to manage such lands according to his authority under this Act and other applicable law in a manner so as not to impair the suitability of such areas for preservation as wilderness . . ." (Emphasis added). This language is referred to as the "nonimpairment" mandate. To comply with this mandate, the BLM must monitor and regulate the activities of off-highway vehicles in the Wilderness Study Area (WSAs) to assure that their use in the WSAs does not compromise these areas by impairing their suitability for designation as wilderness.

The BLM's Off Road Vehicle Regulations, 43 CFR 8342.1, require that the BLM establish offroad designations of areas and trails that meet the non-impairment mandate. It is the BLM's policy that cross-country vehicle use in the WSAs does cause the impairment of wilderness suitability. The BLM policy establishing what is necessary to prevent such impairment is set forth in BLM Manual Handbook H-8550-1, Interim Management Policy and Guidelines for Lands Under Wilderness Review. In Chapter 1, Paragraph 2.B.a., nonimpairing use is ". . . a temporary use that does not create surface disturbance . . .". Uses that cause surface disturbance are, therefore, impairing uses. In the same chapter in Paragraph 3, under the heading Surface Disturbance, it states "Cross-country vehicle use off boundary roads and existing ways is surface disturbing because the tracks created by the vehicle leave depressions or ruts, compact the soils and trample or compress vegetation."

Except for a very narrow range of exceptions, primarily involving emergencies or search and rescue operations, the BLM should establish off-road vehicle designations in WSAs that limit vehicular access to boundary roads or ways existing inside a WSA, which were identified during the inventory phase of the wilderness review.

We will soon instruct all Field Offices to determine whether this requirement has been met and to report this information back to the Washington Office. To prepare for this information request, Field Offices should complete a preliminary review of off-road vehicle designations in WSAs and wilderness inventory records within wilderness study area case files. This

review will facilitate an accurate and expeditious response.

If you have any questions, please contact Rob Hellie on (202) 452-7703 or Robert Hellie@blm.gov.

Signed by:
Nina Rose Hatfield
Deputy Director

Authenticated by
Robert M. Williams
Directives, Records
& Internet Group, WO540

EA NUMBER UT-050-089-084-EA

OFF-ROAD VEHICLE IMPLEMENTATION
Henry Mountains Planning Area

Team Leader: William Booker
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Recommended By:

/s/	Aug. 2, 1990
Resource Area Manager	Date

Reviewed By:

/s/	Aug. 2, 1990
Area Coordinator	Date
/s/	Sept. 14, 1990
Asst. DM for Resources	Date
/s/	Sept. 14, 1990
Environmental Coordinator	Date
/s/	Oct. 9, 1990
Assistant DM for PEA	Date

Approved By:

/s/	Oct. 9, 1990
District Manager	Date

A. PURPOSE AND NEED

Executive Order 11644 (37 CFR 2877 as amended by Executive Order 11989) requires Federal land management agencies to designate specific areas and trails under their jurisdiction where Off-Road Vehicle (ORV) use will be permitted, and areas and trails where such use will not be allowed.

A plan has been prepared which identifies specific actions needed to implement the off-road vehicle decisions in the Henry Mountains Management Framework Plan (MFP) and Wilderness Interim Management Policy (WIMP). The MFP considered the extent and type of ORV use and identified conflicts that needed to be resolved. The designations resulted from an interdisciplinary analysis and public review.

B. DESCRIPTION OF THE PROPOSED ACTION AND ALTERNATIVES

Proposed Action

The proposed action will implement ORV management decisions contained in the Henry Mountains Framework Plan and Wilderness Interim Management Policy. The Henry Mountains Planning Area ORV designations, with associated travel restrictions, involve a total of 1,413,490 public land acres.

The location of the open, limited and closed areas are shown on Map 1 in the map section of this Environmental Assessment (EA). In addition to the ORV designations established by the Henry Mountains MFP, the recently revised Interim Management Policy and Guidelines for Lands Under Wilderness Review, update document (H-8550-1) states that within Wilderness Study Areas (WSAs):

"Recreational use of mechanical transport, including all motorized devices as well as trail and mountain bikes, may only be allowed on existing ways and trails and within open areas that were designated prior to the passage of FLPMA (October 21, 1976)".

If limiting travel to existing ways and trails is more restrictive than what was identified in the MFP, this restriction will apply until the WSAs are designated as wilderness or are otherwise released from study status. WSAs are shown on Map 2, in the map section.

Off road vehicle designations are summarized below:

Designations

a.	Open Vehicle Use Area	942,926 acres
b.	Limited Vehicle Use Areas	312,639 acres
	1. Use Limited to Existing Maintained Roads	3,120 acres
	2. Use Limited to Existing Roads and Trails	4,960 acres
	3. Use Limited to Designated Roads and Trails	4,880 acres
	4. Use Limited to Existing Ways and Trails	266,079 acres
	5. Seasonal Closure	33,600 acres
c.	Closed Vehicle Use Areas	157,925 acres
d.	Hiking Trails Closed to Vehicle Use	7 miles

The MFP identified other ORV management actions.

a. Thirteen-thousand sixty acres have been identified for intensive monitoring where ORV use may cause significant damage. This area is shown on Map 3, in the map section.

b. Roads in the Dirty Devil area and Little Rockies area will be studied for possible physical closure and rehabilitation.

c. Two intensive use areas have been designated in order to concentrate ORV use and discourage indiscriminate cross country travel. These areas are shown on Map 1.

A plan has been prepared which identifies actions required to implement the ORV designations. The emphasis in the plan is on informing the public land user of the necessity for the designations in order to gain voluntary compliance. On-the-ground observation through use supervision and monitoring will be relied upon to amend the plan as circumstance warrants. A copy of the plan is contained in the Appendix.

Alternatives

Since BLM is required to designate public lands, a no action alternative is not feasible. Changes in the ORV designations identified in the MFP can only be accomplished through a planning amendment. Therefore, the only alternative to be analyzed will be that of closing all WSAs.

C. AFFECTED ENVIRONMENT

The following description of the affected environment is based on the final Henry Mountains Grazing Environmental Impact Statement, Richfield District, May 1983.

WATER RESOURCES

The Henry Mountains planning area is located in the Upper Colorado River Sub-basin of the Colorado Hydrologic Region and contains 113 streams (many are intermittent). The planning area is divided into four drainage subareas: the Lower Fremont River, the Lower Muddy River, the Dirty Devil River, and direct drainage into the Colorado River.

* * * *

D. ENVIRONMENTAL CONSEQUENCES

1. Proposed Action

a. Environmental Impacts

It is assumed that use would continue at approximately its present rate on all areas in the resource area not proposed for limited use or closure. Restrictive designations involve areas that are generally inaccessible or undesirable for ORV use. Therefore, use is low, meaning few if any users will be displaced into open areas from restricted areas.

Water Resources

Water quality is highly variable in the resource area, depending on time of year, flow, and physical location. Stream water quality is primarily limited by high sediment load and dissolved solids concentrations.

Runoff from public lands tends to accumulate salts and sediment and transports them into the main drainages during storms, adding salt to the Green and Colorado Rivers.

Ground water quality is highly variable, depending on the formation in which the aquifer is located.

Impacts to water can be measured by change of the quality of surface and ground water. Surface water quality is generally a tertiary impact governed by soil loss resulting from surface disturbance. Sediment and salts are added to the water systems with surface-disturbing activities.

ORV use will contribute sediments and salts to the river systems and therefore degrade the water quality due to, but not limited by, some of the following causes:

1. ORVs often establish a major network of rills and gullies which concentrate and channel runoff, increasing erosion on and off the site. Soil is often lost in these newly created and unvegetated channels.
2. On steep slopes, ORVs make deep grooves which are then deepened by runoff energies, thus transporting more soil particles. Erosion becomes more severe if slopes exceed 20 percent, but slope does not limit the machines until it exceeds 40 percent.
3. ORVs can compact and disrupt the soil surface which 1) reduces the infiltration capacity, causing more water to run off and allowing more soil transport; 2) reduces the soil's capability to absorb water, leaving less water available to the plants; 3) allows more soil particles to be available for transport by disrupting the soils crust; and 4) results in a loss of plant cover, which opens areas to wind erosion onsite and offsite. Soil particles, particularly sands, can spread downward, burying and killing vegetation that was not directly damaged by ORVs.

4. The quality of water at the ORV site is reduced by increased runoff that results from the removal of vegetation cover and soil compaction. ORV tracks become partly sealed to infiltration and act as channels for the overland flow, again increasing runoff.
5. ORV use can greatly increase erosion, and thus salinity, from Mancos-derived soils. The BLM salinity team recommends that ORV use should be severely curtailed on this soil type. The sparse vegetation and easily compacted soil are not capable of absorbing the impacts of repeated compaction from vehicles. Once rilling is started, gully erosion occurs very rapidly.
6. Increased runoff and decreased plant cover can cause an increase in the frequency and magnitude of flooding.
7. Much of the soil that is eroded from the and by ORV use ultimately enters surface waters, where it contributes to the sediment and salt load and accelerates siltation of the streams.
8. ORV users can add biological and chemical contaminants to the soils, and hence, to the surface or ground water, with small quantities of gas or oil spilled or leaked from their machines.

Therefore areas open to ORV use may experience a continued increase in sediment and salt, because of increased surface disturbance (destruction of vegetation, soil compaction, disruption of the soil surface, destruction of surface stabilizer, reduction of infiltration capacity, increased frequency and intensity of runoff and concentration and channeling of runoff) caused by ORV traffic.

Erosion from areas left open to designated roads and trails should be minimal, as most of the disturbance has already occurred. However, continued use of these roads and trails may cause small amounts of sediment movement and increased runoff.

Recreation

Designation of open areas would be viewed as beneficial by people who favor unrestricted ORV use for hunting access, recreation, and mineral exploration/development. The proposed designations will represent only a slight change from existing unrestricted use. Adverse impacts are anticipated for people who favor restriction of cross country vehicle travel to protect other resource values and uses. These negative impacts would occur to members of the public that favor protection of vegetation for wildlife and livestock use, cultural resource values, and existing scenic values.

Designations which prohibit or limit vehicle use to existing roads and trails would be perceived as beneficial by members of the public that favor vehicle restrictions. ORV users would view these designations as restrictions on their freedom.

The impact of ORV noise on people engaged in non-mechanized recreation can be significant. Annoyance with ORV noise is not solely a function of the level, it also depends on listener attitude.

Designations will preserve areas of scenic grandeur and prevent damage to important recreation resources. Two areas have been identified for intensive ORV use. Providing areas specifically established for off road riding will reduce indiscriminate cross country travel in the remaining open area. The result is less impact to vegetation, soils, scenic features, and wildlife. Designa-

tion of two-thirds of the planning area as open will benefit people who favor unrestricted ORV use. A wide variety of terrain types and challenge is available in the open area.

Wilderness

Every WSA has been designated as either limited or closed. These designations will prevent impairment of wilderness character resulting from unregulated vehicle use. Continued travel on existing ways and trails in limited areas will increase the visibility and permanence of these features. This will adversely effect rehabilitation of these ways and trails if the area is included in the National Wilderness Preservation System. See "Impact to Wilderness Values Evaluation under the Non-Impairment Standard" in the Clerk List and Staff Report Section.

Vegetation

Direct impacts to vegetation caused by ORV use are attributed to removal of vegetative cover and tracking. Plants run over are directly impacted by crushing, breakage, or uprooting. Such traumatized plants, if not killed outright, are susceptible to death through desiccation and invasion by parasites and pathogens. Indirect impacts to vegetation arise from impacts to the growing medium. Removal of cover exposes the soil to erosive forces of wind and water. Tracking on other than sandy soils increases the bulk density of the surface soil. This usually results in decreased infiltration of water into the soil and increased runoff. With removal of cover and reduction of organic matter, the soil warms more rapidly in the spring. Ruts and gullies created through tracking channel moisture from the site. This, combined with decreased infiltration, creates

a drier microclimate for the vegetation. Over large areas, this and related processes are known as desertification.

Removal of cover including cryptograms on sandy soils exposes the sand to higher wind velocities at the soil surface. The vegetation also provides a place for deposition to occur. Cover loss can cause the dune to "blow out." Vegetated sand dunes concentrate and cycle nutrients in the top foot of sand. A blow out exposes a more barren substrate that is difficult to revegetate.

In any case, the impact of ORVs on vegetation is density dependant. The greater the use of ORVs, the greater the impact. Adverse impacts to vegetation are expected to continue at the present rate on areas designated as open.

The restrictive designations will protect important riparian areas and will have no adverse affect on threatened, endangered or sensitive plant species. Eliminating ORV use in some areas could have beneficial impacts to threatened, endangered and sensitive plant habitat. See "Threatened, Endangered, and Sensitive Plant Clearance" in the Check List and Staff Report Section.

Soils

Off-road vehicle use on the moderate to strongly saline hills and pediments often results in severe impacts because these soils are highly erodible and compatible and also because revegetation is very difficult with disturbance. The tracks from light use are enough to create rills which are self-perpetuating even on the more gentle slopes. These rills greatly increase runoff and erosion and leave the soils with significantly less

moisture for plant growth. Since most of these soils are shallow, any significant loss of soil is critical. Increased runoff will aggravate the gullying problem on the alluvial lands below. Most soil erosion problem areas are either closed or restricted.

Dirt bikes have been able to climb directly up slopes of 70 percent. Four-and three-wheelers have been observed taking 50 percent slopes. Use on the steeper slopes will leave permanent scars which will continue to erode.

Off-road vehicle use on the slightly saline soils of the hills and pediments will produce negative impacts with concentrated use. These soils, however, can tolerate light, infrequent ORV use on slopes less than 10 percent because they are less erodible and better able to revegetate. In many areas, these soils are associated with the more saline soils and badlands making separate ORV designation impractical.

The very deep alluvial soils can also tolerate light, infrequent off-road use without significant erosion. However, vehicle use in and around gullies can create severe compaction and channeling which can accelerate gully headcutting. Protective surface crusts become pulverized into powder with ORV disturbance. Areas of concentrated use can experience blowouts of this pulverized soil by wind action. Repeated use and blowouts over time can severely degrade the quality of the surface soil. With wetting, disturbed surfaces usually compress into a thick, nonporous crust which inhibits seedling emergence. Poor physical properties, relatively high salinity and low precipitation cause revegetation to be slow and difficult.

In general, the alluvial outwash soils of the bench and mesa tops can tolerate the most off-road abuse with the least erosion. With light, infrequent use, recovery and revegetation is relatively quick. However, the topsoil is thin and where significant erosion does occur, productivity of the soil can be severely affected.

Threatened and Endangered Species

While restrictions on cross country vehicle travel will benefit threatened and endangered species generally, there may be adverse impacts in open areas since not all threatened and endangered species habitat is included in limited or closed designations. The potential for adverse impacts increases with the growth in use and spread of ORV activity into previously unused areas.

Wildlife

ORV use can significantly impact wildlife populations. Some of the more significant effects include displacement of wildlife from preferred habitats, increased stress to wildlife, destruction of wildlife, habitat alteration, etc.

Wildlife displaced from preferred habitats are subjected to increased predation and less suitable habitat conditions. ORV use generally increases stress to wildlife populations such as bison, mule deer, antelope, and desert bighorn, due to the ability to approach these species closer. Ground-nesting birds, small mammals and other low-mobility wildlife species (reptiles and amphibians) are actually destroyed by ORV use. Specifically, vegetative production and cover is sacrificed in high-use areas.

The designations will cause no known conflicts with threatened, endangered or sensitive animal species. See

"Wildlife (T&E and Sensitive) Clearance for ORV Implementation Plan" in the Check List and Staff Report Section.

Cultural Resources

ORV use is expected to impact cultural resources by providing easy access to archaeological sites which might otherwise remain unvisited. This may lead to increase direct impacts:

-Surface disturbance of archaeological and historic sites ranging from slight damage to total destruction.

-Mixing of occupational layers.

-Artifact collection.

-Erosion of archaeological site features.

-Alternation of internal site configuration by selective destruction of specific feature types.

-Desecration of burials and sacred areas.

-Introduction of visual elements which detract from a site's setting or purpose.

Closure or limiting of vehicles to existing roads and trails could prevent or reduce some of this impact.

Because of the general (nonsite specific) natural of this proposed action and the resulting ORV use, specific impacts to individual cultural resources cannot be identified at this time.

* * * *

OFF-ROAD VEHICLE IMPLEMENTATION PLAN

Henry Mountain Resource Area
Henry Mountain Planning Area

U.S. Department of the Interior
Bureau of Land Management
Richfield District, Utah
September 1988

Prepared by: /s/
Bill Boolan

Approved by: /s/
Glenn T. Patterson

* * * *

I. PURPOSE

The purpose of this plan is to implement Executive Order 11644 (37 CFR 2877 as amended by Executive Order 11989) by identifying actions required to manage off-road vehicle (ORV) use on public lands in the Henry Mountains Planning Area. The ORV designations, with associated travel restrictions, are identified in the Management Framework Plan (MFP) and involve a total of 1,413,490 public land acres.

The emphasis in this plan is on informing the public land user of the necessity for the designations in order to gain voluntary compliance. On-the-ground observation through use supervision and monitoring will be relied upon to amend the plan as circumstance warrants.

II. DESIGNATION CRITERIA

Off-road vehicle designations were determined, along with other land use management decisions, as part of the BLM planning process. The designations discussed in this implementation plan are taken from the Henry Mountains MFP which was revised in 1982. Designations, shown on Map 1, are based on the principle that

ORV recreation is an acceptable use of the public land if it is managed to achieve the objectives of resource protection and minimizing conflicts among various public land users.

* * * *

III. DEFINITIONS

All public land in the planning area has been designated as either open, limited, or closed. The meaning of these designations, as well as other terms associated with off-road vehicle management are found in 43 CFR 8340. The following is a selection of definitions which clarify the meaning of the designations.

A. "Off-road vehicle" means any motorized vehicle capable of or designed for travel on or immediately over land, water, or other natural terrain, excluding:

1. Any nonamphibious registered motor boat:
2. Any military, fire, emergency, or law enforcement vehicle while being used for emergency purposes;
3. Any vehicle whose use is expressly authorized by the authorized officer, or otherwise officially approved;
4. Vehicles in official use; and
5. Any combat or combat support vehicle when used in times of national defense emergencies.

B. "Public lands" means any lands the surface of which is administered by the Bureau of Land Management.

C. "Official use" means use by an employee, agency or designated representative of the Federal government or one of its contractors, in the course of his employment, agency, or representation.

D. "Open area" means an area where all types of vehicles use is permitted at all times, anywhere in the area subject to the operating regulations and vehicle standards set forth in 43 CFR 8341 and 8342.

E. "Limited area" means an area restricted at certain times, in certain areas, and/or certain vehicular use. These restrictions may be of any type, but can generally be accommodated within the following type of categories: Numbers of vehicles; types of vehicles; time or season of vehicle use; permitted or licensed use only; use on existing roads and trails; use on designated roads and trails; and other restrictions.

F. "Closed area" means an area where off-road vehicle use is prohibited. Use of off-road vehicles in closed areas may be allowed for certain reasons; however, such use shall be made only with the approval of the authorized officer.

IV. DESIGNATED AREAS

Off-road vehicle recreation, like other recreation in the planning area, is extensive in nature. There have been no authorized ORV events in the planning area, and there is no demand for such events. Two areas have been identified for intensive ORV use in order to discourage indiscriminate cross country travel.

The ORV designations outlined in this plan only apply to public lands and have no effect on state

or private lands. The location of the open, limited and closed areas are show on Map 1. In addition to the ORV designations established by the Henry Mountains MFP, the recently revised Interim Management Policy and Guidelines for Lands Under Wilderness Review, update document (H-8550-1) states:

"Recreational use of mechanical transport, including all motorized devices as well as trail and mountain bikes, may only be allowed on existing ways and trails and within open areas that were designated prior to the passage of FLPMA (October 21, 1976)".

If limiting travel to existing ways and trails is more restrictive than what was identified in the MFP, this restriction will apply until the WSAs are designated as wilderness or are otherwise released from study status. WSAs are shown on Map 2.

* * * *

Travel restrictions associated with ORV designations discussed in this plan apply to trail and mountain bikes. The following letter prefixes are used to denote the type of designation on maps and in the narrative below:

		Acreage
A.	Open Vehicle Use Area	942,926
1.	ORV Activity Areas	1,280
2.	Special Monitoring Area	13,060
B.	Limited Vehicle Use Areas	312,639

1.	Use Limited to Existing Maintained Roads	3,120
2	Use Limited to Existing Roads and Trails	4,960
3.	Use Limited to Designated Roads and Trails	4,880
4.	Use Limited to Existing Ways and Trails	266,079
5.	Seasonal Closure	33,600
C.	Closed Vehicle Use Areas	157,925
D.	Road Closures	

A. Open Vehicle Use Area

The Henry Mountains Planning Area contains 1,413,490 acres of public land. Approximately 942,926 acres (67%) of public land remains open to ORV use subject to the operating regulations and vehicle standards set forth in 43 CFR 8341 and 8343.

The MFP identified a need to designate two intensive use areas and one special monitoring area.

1. ORV Activity Areas

a. Blue Valley (640 acres)

ORV use occurring in this general area may spread and impact sensitive resources. Guiding ORV use to this site will provide a play area for ORV users while providing needed protection of other resources.

b. Ticaboo (640 acres)

ORV use occurring in this general area may spread and impact sensitive resources. Guiding ORV use to this site will provide a play area for ORV users while providing needed protection of other resources.

2. Special Monitoring Area

a. Factory Butte (13,060 acres)

There is a concern about resource damage from ORV use occurring in and around Neilson Wash, between North Caineville Mesa an Factory Butte. The extent of damage to scenic values and watershed is unknown. The area will be monitored and closed if warranted.

B. Limited Vehicle use Areas

Approximately 312,639 acres (22%) of public land within the Henry Mountains Planning Area has been placed in the limited use category. These areas, their limitations, and the rationale for their designation are identified below.

1. Use Limited to Existing Maintained Roads

a. Nasty Flat (1,885 acres)

ORV use has been restricted in support of efforts to rehabilitate damaged portions of the Nasty Flat watershed.

b. Bull Creek (1,235 acres)

ORV use has been restricted in support of efforts to rehabilitate damaged portions of the Bull Creek watershed.

2. Use Limited to Existing Roads and Trails

a. Little Rockies National Natural Landmark (4,960 acres)

The Little Rockies were designated a National Natural Landmark in 1975. This area is significant as a type locality displaying the geological processes for which the Henry Mountains are famous. Unregulated ORV use in this area would diminished the recreational, scenic, and scientific values of the area. This designation applies to the National Natural Landmark outside the Little Rockies WSA.

3. Use Limited to Designated Roads and Trails

a. Bull Creek Archaeological District (4,880 acres)

This area has significant cultural features which are highly sensitive to ORV disturbance. ORV use has been increasing and many new paths and trails in the areas are developing. Restricting vehicle use to designated roads and trails is needed to protect the cultural resources.

4. Use Limited to Existing Ways and Trails

Specific guidelines for ORV use are contained in the Interim Management Policy and Guidelines for Lands Under Wilderness Review. The 1987 update of the IMP allows for "recreational use of mechanical transport, including all motorized devices as well as trail and mountain bikes, only on existing ways and trails . . ." within Wilderness Study Areas.

Five WSAs have acreage wholly within this category:

		WSA Acreage
a.	Fremont Gorge	2,540
b.	French Spring-Happy Canyon	25,000
c.	Horseshoe Canyon	38,800
d.	Bull Mountain	11,800
e.	Mt. Pennell*	74,300

In addition, five WSAs have acreage partially or totally within more restrictive designations.

		WSA Acreage	WSA Acreage Limited to existing Ways & Trails
f.	Fiddler Butte	73,100	71,110
g.	Mt. Ellen-Blue Hills	81,726	33,387
h.	Dirty Devil	61,000	23,489
i.	Mt. Hillers	20,000	18,240
j.	Little Rockies	38,700	-0-

* A portion of Mt. Pennell is also subject to a seasonal closure.

5. Season Closure

   a. Swap Mesa and Cave Flat, closed from December 21 to March 20, (33,600 acres)

This closure is necessary to prevent human activity from disturbing bison and deer during a time when they are under stress from winter temperatures or from calving or fawning.

C. Closed Vehicle Use Areas

Approximately 157,925 acres (11%) of public land within the Henry Mountains Planning Area have been placed in the closed category. These acres are identified below.

1. Pink Cliffs Interpretive Site (1,760 acres)

   The Pink Cliffs offer an excellent opportunity to provide interpretation of the geologic features of the Henry Mountains. The area is adjacent to Star Spring Campground, the most popular developed recreation sites in the Resource Area.

2. Little Rockies Wilderness Study Area (38,700 acres)

   The Little Rockies were designated as a National Natural Landmark in 1975. This area is significant as a type locality displaying the geological processes for which the Henry Mountains are famous. Unregulated ORV use in this area, especially on the steep, loose soils of the upper slopes would diminish the recreational, scenic, and scientific values of the area.

3. North Caineville Mesa ACEC (2,200 acres)

   This mesa represents one of the last natural areas of cold-desert shrubland in the planning area. This resource would be lost if surface disturbing

activities were to occur. Public lands are being subjected to increased land use pressures and lack of activity on the mesas in the past cannot be assumed in the future.

4. South Caineville Mesa ACEC (4,200 acres)

   This mesa represents one of the last natural areas of cold-desert shrubland in the planning area. This resource would be lost if surface disturbing activities were to occur. Public lands are being subjected to increased land use pressures and lack of activity on the mesas in the past cannot be assumed in the future.

5. Blue Hills (44,908 acres)

   This closure will assist in protecting an area with unstable soils, significant scenery, and scientific values that are subjected to increasing ORV use. Closing this area will help contain ORV use to established concentration areas and identify to the public the restricted areas before unwanted user patterns evolve.

6. Dirty Devil (57,677 acres)

   The canyons of the Dirty Devil River have long been identified as having high scenic, geological, historical, cultural, and recreational values. Any ORV use in this area conflicts with these values. Although ORV use is currently low, it is preferable to guide ORV use away from this area by a management actions before user patterns become established.

7. Beaver Canyon ACEC (4,800 acres)

   Beaver Canyon has important biological values which would be lost or diminished if ORV use

occurred. Beaver Canyon is the cold-desert riparian ecosystem classified as being in good condition.

8. Gilbert Baldlands Research Natural Area (3,680 acres)

   This is an areas of important studies of geomorphic processes. The Upper Blue Hills have been a classic area of landform study since Gilbert worked here more than one hundred years ago. This lengthy period of investigation has allowed analysis of land form changes that are long-term on a human scale. Studies are still in progress today.

9. Hiking Trails

   The following hiking trails are closed:

   a. Mt: Ellen Summit
   b. Angel (both sides)
   c. Panorama Point
   d. Hog Spring
   e. Dandelion Flat
   f. North Caineville Mesa
   g. South Caineville Mesa

D. Road Closures

   1. Little Rockies

      Roads and ways on the west and south sides of the Little Rockies National Natural Landmark where access is no longer necessary for mining or ranching operations will be closed. The necessity and feasibility of rehabilitation will be determined.

2. Dirty Devil

Roads north of Happy Canyon within the Dirty Devil Canyon will be studied to determine the necessity and feasibility of rehabilitation.

3. Garfield and Wayne Counties

The Utah Off-Highway Vehicle Act of 1987 provides:

> "Off-highway vehicles may be operated on public lands, streets and highways that are posted by sign or designated by map by the controlling federal, state, county or city agency as open to off-highway vehicle use."

Public land as not identified as "limited" or "closed " are designated open to off-highway vehicles. County roads are closed for ORV use unless designated open by the county. An official position regarding county roads will be obtained from Garfield and Wayne Counties in order to ORV users to know which county roads on BLM administered public lands are available for their use.

V. PREDESIGNATION ACTIONS

The objective of predesignation actions is to develop procedures for advising the public of ORV designations, their purpose, and to identify requirements for on-the-ground implementation of travel restrictions. The purpose of this plan is to specify the minimum actions required for implementation.

A. Public Announcements and Participation

1. BLM will meet with Garfield and Wayne Counties to inform the Commissioners of the

designations, discuss the Utah Off-Highway Vehicle Act of 1987, and solicit support for enforcement.

2. Copies of the implementation plan will be sent to the State Resources Development Coordination Council, Division of State Parks, and National Park Service.

3. Notice of the designations will be published in the local and state newspapers. The articles will discuss the designations and their purpose emphasizing the volunteer compliance with the designations.

VI. DESIGNATION ACTIONS

A. Brochures and User Maps

Brochures and maps will be the primary source of public information for ORV designations.

1. ORV user maps (travel guides) will be prepared. The maps will be in accordance with adopted USO graphics standards and be $^1/_4$ inch to the mile scale. The maps will show land status and identify a number of recreation attractions located in the area and include the following:

   a. Reference to execution orders mandating ORV management designation.

   b. An explanation of the designations and their purposes.

   c. Restrictions applicable to the roads and trails in the closed and limited category.

   d. Messages on safety, environmental awareness, and outdoor manners.

e. Explanation of ORV signs and their meaning.

f. Land status will be shown in color to help the public identify the location of public, private and other agency lands.

2. Large scale maps of the designated areas will be prepared which show the location of designations; existing roads, trails, and ways; restrictions; and sign locations. These maps will become part of the use supervision files.

B. Signs

Identification of travel restrictions will be accomplished by use of signs. Signs will generally be installed only in problem areas or where there are high resource values which could be impacted by indiscriminant ORV use.

Standard BLM signs will be utilized along with standard decals and fiberglass sign units. A sign identifying the seasonal closure on Swap Mesa and Cave Flat will be ordered.

C. Use Supervision and Monitoring

Executive Order 1644 and 43 CFR 8342.3 require that the effects of ORV use be monitored on public lands and authorizes the amendment of designations when appropriate. Executive Order 11989 further provides that amendments shall be made whenever it is determined "that the use of ORVs will cause or is causing consideration adverse effects on soil, vegetation, wildlife, wildlife habitat, or cultural or historic resources of particular areas of trails."

Use supervision and monitoring is a prerequisite to accomplishing the protection objectives associated with the various ORV designations. Increased work will be

required in supervising areas designated as "limited" and especially in the more sensitive areas designated "closed". The emphasis on use supervision will be placed on these areas.

Resource damage will be documented and recommendations made for corrective action. An ORV use supervision file will be established for each of the designated areas. All observations regarding the areas will be placed in the supervision files. Reports should identify, among other things, resource damage, the need for additional signing, sign maintenance, etc. Use supervision and monitoring will primarily be the responsibility of the HMRA Outdoor Recreation Planner.

Monitoring in open areas will focus on determining damage which may necessitate a change in designation. Visitor safety will be the responsibility of the user since operational hazards are inherent to this type of recreational activity. Careful vehicle operations and adherence to safety provisions of the ORV regulations will foster public safety. Speed limits have not been established for open or limited areas except in developed campgrounds. Terrain characteristics dictate a prudent speed.

Areas designated as limited or closed should, if accessible, be checked at least once per month from March through October. Inaccessible areas should be checked no less than twice annually, once early in the spring and once in the fall. Adjustments in this schedule can be made as experience is accumulated.

D. Special Monitoring: Lands Under Wilderness Review

The Interim-Management Policy and Guidelines for Lands Under Wilderness Review provides that ORV activity will be managed to prevent impairment of wilderness suitability. Continuing or increasing ORV use will result in increased adverse impacts and may require more restrictive management action. Lands under wilderness review will be shown on the maps and brochures. The restriction limiting ORV use to existing ways and trails will be monitored as part of the monthly wilderness study area surveillance patrols.

E. Maintenance

Maintenance inspections of signs in designated areas will be conducted at a minimum of two times per year and more often in sensitive areas. Patrols should be used to routinely identify sign maintenance needs.

F. Physical Constraints

The road into Bull Pasture, constructed by Cotter, will be physically closed.* While no other physical constraints have been identified they may be employed if signing is not successful in deterring ORV use in closed or limited areas.

VIII. ADMINSITRATIVE ACTIONS

A. Enforcement

Use supervision in open areas will concentrate on compliance with "regulations governing use" 43 CFR

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* Required by stipulation number 10, Cotter Corporation's Proposed Uranium Exploration Drilling Program in the Dirty Devil River Proposed Wilderness Study Area. (Environmental Assessment Record No. UT-050-0-102)

8341.1 and Rules of Conduct in 43 CFR 8365.1-4. In limited and closed areas, use supervision will focus on compliance with the ORV designations.

While use supervision efforts will primarily be directed towards promoting voluntary compliance with the ORV regulations and designations, legal action may become necessary to halt violations.

Enforcement of violations under trespass procedures will be accomplished by area and district personnel. Criminal violations must be referred to local law enforcement authorities or BLM special agents. District or area personnel should thoroughly document violations which have been knowingly and willfully committed prior to requesting outside assistance.

B. Nonrecreational Access

An exclusion is provided in the ORV regulations to allow for vehicular access in closed or limited areas. Other land owners and resource users that are affected by closed or limited designations should be contacted and requested to apply for specific access authorization. Case-by-case authorizations should be approved on the basis of demonstrated need or previous access requirements. Special conditions should be attached to each specific authorization to protect the resource values that necessitated a restrictive ORV designation.

C. Competitive/Commercial/Group Events

ORV events which are subject to provisions of the permit and fee system regulations (43 CFR 8372) will be restricted to designated open areas, particularly the ORV activity area.

San Rafael

Final Resource Management Plan
U.S. Department of the Interior
Bureau of Land Management
Utah State Office
Moab District
San Rafael Resource Area May 1991

* * * *

GENERAL MANAGEMENT GUIDANCE

Two public land areas, San Rafael Swell and Labyrinth Canyon, are managed as SRMAs in recognition of their intensive use or special recreation values. The remaining public lands are managed as an extensive recreation management area (RMA). An SRMA serves as the basis for preparing an activity plan. A recreation management plan will be developed for each SRMA in the planning area.

Dispersed recreation use will be allowed throughout the planning area, with permits required for commercial use. If demand increases, BLM may require permits for use in other areas where needed to protect resource values; this will not require a plan amendment.

Recreational rockhounding occurs throughout the planning area. No part of the planning area will be designated closed to rockhounding. However, fossils of scientific interest, including dinosaur bone, may not be collected on public land; Public Law 209 prohibits excavation or collection of fossils without a permit.

SRRA will continue to manage recreation use of the Green River in cooperation with the Grand Resource

Area, Moab District, BLM, and with the Utah State Division of Parks and Recreation.

Emery County and the town of Green River propose to establish a scenic loop road along existing vehicle routes in the San Rafael Swell and Desert. Alternatives or improvements to the existing road will be authorized on a case-by-case basis.

In the Nationwide Rivers Inventory (NRI) [NPS, 1982], NPS lists the Green and San Rafael Rivers as potential additions to the National Wild and Scenic Rivers System under the Wild and Scenic Rivers Act. BLM has identified a portion of Muddy Creek in SRRA as having potential for wild and scenic designation. Designation to the National Wild and Scenic Rivers System would be made by Congress and would amend this plan.

Interim management of the three rivers will serve to protect the identified values until Congress acts. NEPA documents prepared for any proposals for use of the study segments will take these values into account and provide mitigation for potentially adverse impacts. Actions allowed under interim management will be subject to the special conditions developed in the RMP (see Potential Wild and Scenic River Interim Management Prescriptions, chapter 3). Table 16 shows the potential classification of the several river segments (see map 16). Segment 5 of the San Rafael River was determined ineligible and thus not classified.

The three rivers identified above were the only rivers considered in the RMP process for eligibility for wild and scenic rivers. Additional planning will be needed to evaluate other rivers for eligibility under the Wild and Scenic Rivers Act. Suitability for designation as a wild

and scenic river will be determined in a future plan amendment for the three original rivers and any additional rivers or streams determined to be eligible.

ROS classes have been identified based on inventory work. Classes are based on five setting factors, which are reviewed periodically. A change in conditions could result in a change in ROS class. However, RMP special conditions (if any) developed to protect specific ROS class areas reflect conditions present when the RMP was prepared and may be changed only through a plan amendment.

Management restrictions are not necessary to maintain ROS class areas toward the urban end of the spectrum, including roaded natural (RN), rural (R) and urban (U). Therefore, no attempt will be made to manage for these specific ROS class areas.

ORV use designations developed in the RMP will be made following completion of an ORV implementation plan. Criteria will be developed to determine the specific course of action needed to implement the ORV allocation decision—ORV designations do not apply to state, county or BLM system roads, or to private or state inholdings. An assessment will be made to determine a

TABLE 16
Wild and Scenic River Study Segments
and Potential Classifications

River Name	Wild	Scenic
Green River	Segment 2: Ruby Ranch (mile 96) to Hey Joe Canyon (mile 76)	Segment 1: Green River State Park (mile 120) to Ruby Ranch (mile 96) Segment 3: Hay Joe Canyon (mile 76) to Canyonlands NP (mile 47)
San Rafael River	Segment 2: Lower Fuller Bottom (mile 103.7) to Johansen Cabin (mile 89.3)	Segment 1: Ferron/ Cottonwood confluence (mile 111) to Lower Fuller Bottom (mile 103.7)
	Segment 4: Lockhart Wash (mile 77.2) to Tidwell Bottom (mile 50.6)	Segment 3: Johansen Cabin (mile 89.3) to Lockhart Wash (mile 77.2)
Muddy Creek	Segment 1: Highway I-70 (mile 76.6) to gauging station above Lone Tree Crossing (mile 66.6)	Segment 2: Gauging station above Lone Tree Crossing (mile 65.6) to South Salt Wash (mile 53.6)

River Name	Wild	Scenic
	Segment 3: South Salt Wash (mile 65.5) to the north end of Tomsich Butte (mile 46)	Segment 4: Tomsich Butte (mile 46) to Penitentiary Canyon (mile 42.4)
	Segment 5: Penitentiary Canyon (mile 42.4) to Hidden Splendor Mine (mile 30)	Segment 6: Hidden Splendor Mine (mile 30) to Emery County boundary (mile 18.5)

NOTE: Segment 5 of the San Rafael River was determined ineligible and therefore not classified.

* * * *

purpose and need for public land non-system roads. Public participation will be encouraged to assist BLM in identifying which non-system roads should be designated as open. The implementation plan (map 17) will become effective following publication of a *Federal Register* notice after the RMP is complete.

The ORV designations do not distinguish between recreational and nonrecreational use; ORV use in an area designated closed or limited may be allowed under an authorized permit. ORV designations can be changed only through a plan amendment.

In 1986, a cooperative management agreement between BLM and Pathfinders Motorcycle Club, Inc. of Price, Utah provided for joint development and management of a system of motorcycle trails within the San Rafael Swell in the Temple Mountain vicinity. The agreement will remain in effect.

Current Recreation Management Areas	Acres
Special Recreation Management Areas	
- San Rafael Swell	846,340
- Labyrinth Canyon	49,220
TOTAL	895,560
Extensive Recreation Management Area	
- Remainder of SRRA	568,180
Developed Recreation Sites	
- San Rafael Campground	10
- Buckhorn Pictographs	10
- Cattleguard Pictographs	10
- Swasey Cabin Historic Site	10
- Wedge Overlook	20
- Tomsich Butte Campground	20
- Justasen Flats Campground	20
TOTAL	100
SPECIFIC MANAGEMENT AREAS	Acres
- Manage to preserve ROS P-class areas	117,720
- Manage to protect ROS SPMM-class areas outside ACECs	152,950
- Develop 2 SRM management plans	895,560
Developed Recreation Sites	*Acres*
- Intensify management of 7 developed recreation sites to protect facilities; develop or improve 3 of those recreation sites	100
ORV Use Designations	Acres
- Open to ORV use	*281,820
- Open with seasonal restrictions	* 11,600
- Limited to existing roads and trails	0
- Limited to designated roads and trails	1,018,650
- Closed to ORV use	151,770

[a] Subject to change, pending antelope fawning range inventory.

The following areas will be open to ORV use with seasonal restrictions:

- deer and elk crucial winter ranges (12/01 to 04/16)
- antelope crucial habitat (05/15 to 06/16)

ORV use in the following areas will be limited to designated roads and trails:

- Copper Globe, Dry Lake Archaeological District, Pictographs, and Swasey Cabin ACECs; and portions of Highway I-70 Scenic Corridor, Muddy Creek, Middle San Raf Canyon, San Rafael Reef, Segers Hole, and Sids Mountain ACECs
- existing land leases
- San Rafael Swell SRMA
- developed recreation sites
- critical soils
- riparian and aquatic habitat
- bighorn sheep crucial habitat

The following areas will be closed to ORV use:

- Big Flat Tops, Bowknot Bend, and Lower and Upper San Rafael Canyon ACECs; and portions of Muddy Creek, Highway I-70 Scenic Corridor, Middle San Rafael Canyon, Sids Mountain, Segers Hole, and San Rafael Reef ACECs
- ROS P-Class areas

VISUAL RESOURCE MANAGEMENT

MANAGEMENT OBJECTIVE

+ To provide design standards that protect or enhance designated VRM classes.

* * * *

TABLE 19

Anticipated Implementation and Monitoring of Plan Decisions, by Management Program

Program	Implementation	Schedule	Monitoring Objectives[a]
Oil and Gas Management	Issue leases with proper stipulations and special conditions (by USO).	Immediate upon approval of RMP	Ensure that plats are correct and leases are issued with proper conditions.
	Apply RMP stipulations and special conditions to applications for permit to drill (APDs) and other projects through NEPA documentation.	Ongoing.	Ensure compliance with NEPA; [a] determine if RMP objectives are valid.
	Apply RMP stipulations and special conditions to geophysical activities.	Ongoing.	Ensure compliance with FLPMA.[b]

Program	Implementation	Schedule	Monitoring Objectives[a]
Geothermal Management	Issue leases with proper stipulations and special conditions (by USA).	Undetermined	If leased, ensure that plats are correct and leases issued with proper conditions; fieldcheck for presence or absence of geothermal resources.
	Apply RMP stipulations and special conditions to licenses and plans of operation and other projects through NEPA documentation. Amend RMP if necessary.	Undetermined	Ensure compliance with NEPA; [a] determine if RMP objectives are valid.

Program	Implementation	Schedule	Monitoring Objectives[a]
Coal Management	Apply RMP and unsuitability stipulations and special conditions for leasing, exploration and mining operations on public land inside the Emery coal field.	Ongoing.	Ensure compliance with existing laws; determine if RMP and unsuitability objectives are valid. Ensure that plants are correct and leases are issued with proper conditions.
	Continue administering operations on coal leases.	Ongoing.	Ensure lease compliance.
Mineral Materials Management	Apply RMP stipulations and special conditions to applications for disposal through NEPA documentation.	Ongoing.	Ensure compliance with NEPA; [a] determine if RMP objectives are valid.

Program	Implementation	Schedule	Monitoring Objectives[a]
Cultural Resource Management (Concluded)	Prepare CRMPs; apply RMP stipulations and special conditions through NEPA documentation. Prioritize as follows: area CRMP (site managed for public values).	Area CRMP within 3 years; then one site-specific CRMP per year.	Ensure compliance with NEPA; [a] determine if RMP objectives are being met; see if RMP objectives are valid.
Wilderness Management	Reserved[c]	Reserved	Reserved
Recreation/ Visual Resource Management	Apply ORV designations; document through ORV implementation plan; apply RMP objectives through NEPA documentation.	Within 1 year after approval of RMP.	Ensure compliance with NEPA; [a] determine if RMP objectives are valid.
	Apply VRM classes in designated areas.	Immediate upon approval of RMP.	Watch for cumulative impacts; see if RMP objectives are met; determine if objectives are valid.

Program	Implementation	Schedule	Monitoring Objectives[a]
	Conduct suitability studies for wild and scenic river designations; coordinate with other agencies involved in joint studies and in preparing legislative EIS. Prioritize as follows: - Green River - San Rafael River - Muddy Creek	Within 5 years after approval of RMP.	Ensure studies are completed; determine followup actions; determine if RMP objectives are valid.
	Analyze all rivers in the resource area as to eligibility and classification for wild and scenic river designations and develop interim management prescriptions to protect classification.	Within 5 years after approval of RMP.	Ensure analysis is completed; determine followup actions; determine if interim management prescriptions and RMP objectives are appropriate.

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

Case No. 2:99-CV-852K

SOUTHERN UTAH WILDERNESS ALLIANCE,
A UTAH NON-PROFIT CORPORATION, ET AL.,
PLAINTIFFS

v.

BRUCE BABBITT, UNITED STATES DEPARTMENT OF
INTERIOR IN HIS CAPACITY AS SECRETARY OF
INTERIOR, DEFENDANTS

AND

UTAH SHARED ACCESS ALLIANCE, A UTAH NON-PROFIT
CORPORATION, ET AL., DEFENDANTS-INTERVENORS

DEFENDANTS' RESPONSES TO PLAINTIFFS' FIRST SET OF REQUESTS FOR ADMISSIONS

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* * * *

Request No. 8: The BLM has not prepared and/or distributed an ORV designation brochure, as that item is utilized on page 4 in the Price River Resource Area Off-Road Vehicle Implementation Plan.

Response: Admitted.

Request No. 9: The BLM has not prepared or established "ORV designations," with corresponding notices in the Federal Register, as that term is utilized on page

7 in the Price River Resource Area Off-Road Vehicle Implementation Plan.

Response: Admitted.

Request No. 10: The BLM has not prepared and/or implemented an "ORV implementation plan," as that term is utilized on page 99 in the San Rafael Resource Management Plan.

Response: Denied. The BLM has prepared a proposed San Rafael Off-Highway Vehicle Travel Plan, dated October 6, 1997. The plan has gone through the public scooping process, and the recent San Rafael closures constitute a partial implementation of the plan.

* * * *

Request No. 16: The BLM has not closed "Trugh Hollow" to ORV use as required on page 2 in the Forest Planning Unit Off-Road Vehicle Implementation Plan.

Response: Admitted.

Request No. 17: The BLM has not implemented the monitoring duties described as "post-designations" on pages 3-4 in the Forest Planning Unit Off-Road Vehicle Implementation Plan.

Response: Admitted.

Request No. 18: The BLM has not prepared a map or brochure illustrating the ORV designations in the Mountain Valley Planning Unit, as that obligation is stated on page 3 of the Mountain Valley Planning Area Off-Road Vehicle Implementation Plan.

Response: Admitted.

Request No. 19: The BLM has not implemented and/or documented the monitoring detailed as a "miti-

gating measure []" on page 35 in the Henry Mountains Planning Area ORV Implementation Plan EA and as detailed as "post designation actions" in section VI of the Henry Mountain Resource Area Off-Road Vehicle Implementation Plan.

Response: Admitted.

Request No. 20: The BLM has not engaged in "special monitoring" of "Factory Butte," as those terms as utilized in section IV.A.2 of the Henry Mountain Resource Area Off-Road Vehicle Implementation Plan.

Response: Admitted.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

Case No. 2:99-CV-852K

SOUTHERN UTAH WILDERNESS ALLIANCE, A UTAH NON-PROFIT CORPORATION, ET AL., PLAINTIFFS

v.

BRUCE BABBITT, UNITED STATES DEPARTMENT OF INTERIOR IN HIS CAPACITY AS SECRETARY OF INTERIOR, DEFENDANTS

UTAH SHARED ACCESS ALLIANCE, A UTAH NON-PROFIT CORPORATION, ET AL., BLUE RIBBON COALITION, AN IDAHO NONPROFIT CORPORATION, ELITE MOTOR-CYCLE TOURS, A UTAH CORPORATION, AND ANTHONY CHATTERLY, DEFENDANTS-INTERVENORS

Transcript of Hearing on Motion
for Preliminary Injunction

[Aug. 28, 2000]

Volume I

BEFORE THE HONORABLE DALE A. KIMBALL

Reported By: Karen Murakami, CSR, RPR,
Laura Robinson, RPR

[Argument of Paul A. Torke for Intervenors]

[29]

* * * *

that standard. I think where we end up in this analysis in this case is that there must be a showing that the degradation which has occurred impairs the entire areas of suitability for possible wilderness designation.

To state that standard exposes the fact that that is the kind of determination that can't be made in an APA 706(1)case.

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

Case No. 2:99-CV-852K

SOUTHERN UTAH WILDERNESS ALLIANCE,
A UTAH NON-PROFIT CORPORATION, ET AL., PLAINTIFFS

v.

BRUCE BABBITT, UNITED STATES DEPARTMENT OF
INTERIOR IN HIS CAPACITY AS SECRETARY OF
INTERIOR, DEFENDANTS

UTAH SHARED ACCESS ALLIANCE, A UTAH NON-PROFIT
CORPORATION, ET AL., BLUE RIBBON COALITION, AN
IDAHO NONPROFIT CORPORATION, ELITE MOTOR-CYCLE
TOURS, A UTAH CORPORATION, AND ANTHONY
CHATTERLY, DEFENDANTS-INTERVENORS

Reporters' Transcript of Proceedings

[Aug. 29, 2000]

Volume II

BEFORE THE HONORABLE DALE A. KIMBALL

[Testimony of Bill Stringer, BLM]

* * * *

Q. Sorry. Are you under the impression that 200 acres–200 acres of damage is not in violation of the IMP?

A. I guess I am, yes.

Q. Thank you. I'm sorry, the second question—

[306]

THE COURT: Wait a minute, he is entitled to finish his answer. Don't interrupt.

THE WITNESS: The way the 200 acres is, it is not a large block of land in the middle or it is not a consolidated piece, it is a very small piece along an edge.

And altogether, even if it were a block on the southeastern end, it constitutes less than I think it is eight-tenths of a percent of the overall area. And that I would say in my capacity if we were asked again to supply that information to the president for recommendation to congress we would not not change that recommendation.

* * * *

[Testimony of Ronald Bolander, BLM]

[378]

* * * *

Q. Let me try to get this a different way. What kind of change in ORV use and impacts would bring about a change In your management plans or would cause you to initiate a change in your management plans?

A. In general or for Factory Butte?

Q. For Factory Butte?

A. Oh, I would think if we had data to indicate over a period of years that conflicts were occurring and we were, you know, we were able to quantify those data in some manner do some kind of analysis on it through NEPA through some kind of scoping process to look in trying to decide exactly what the issues involved were, and then be able to make an informed defendable decision that is probably the process we would take.

Q. Now you have to have monitoring to get that kind of data, wouldn't you?

A. I would think so, yes.

Q. And you have not had any kind of formal monitoring in that kind of area in the last 10 years or so have you?

A. Up until this spring well, to answer your question it is no we have not.

Q. And this spring you hired Mr. Finger and he has stated monitoring; is that correct?

A. He has. But we're even to that extent if we were [379] to take the data that we have accumulated over the last 10 years or so and the data that—that Mr. Finger has gathered for us in these recent years, I still don't believe—excuse me, in the last few months. We're still not to the point, I don't think, where we would have something that you could really get your teeth into.

Q. Well let me ask you this. You don't know, do youwhat the ORV use was like in this area back in 1990, do you?

A. Personally?

Q. Yes?

A. Personally I don't. As an agency we do.

Q. Where would that information be?

A. There are still some folks around that worked in that area in 1990 that, you know, would be able to and even in our office that I have talked to that have a sense for what kind of use was occurring at that time.

Q. I see. That would be word of mouth knowledge?

A. That is true.

Q. No documentation?

A. Very little.

Q. Nothing over 10 years you would call a data site?

A. That is true.

Q. Started in March?

A. That is true.

Q. Started in response to this lawsuit?

[380]

A. That is not true.

Q. Um, let me—do you remember your deposition, Mr. Henderson?

A. Very well. It was only last Monday.

Q. Okay. May I approach the witness, Your Honor?

THE COURT: Yes you may.

Q. (By Mr. Wiygul) This is a transcript of your deposition. Could I ask you to read this question answer that are highlighted here? I'll just mark that for you?

A. The question is what prompted the initiation of the monitoring effort Tim Finger arrived in Richfield? The answer well, you know I would be lying if I said it

wasn't a pretty high priority on our plate just because of this action.

Q. Now, would you agree with that again today?

A. Yes, but that is not the question you asked me.

Q. Okay. All right. I appreciate that. That monitoring, Mr. Finger started is going to give you the kind of information that you actually need to make those management decisions our there; isn't that correct?

A. I think ultimately it will, yes.

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

Case No. 2:99-CV-852K

SOUTHERN UTAH WILDERNESS ALLIANCE,
A UTAH NON-PROFIT CORPORATION, ET AL., PLAINTIFFS

v.

BRUCE BABBITT, UNITED STATES DEPARTMENT OF
INTERIOR IN HIS CAPACITY AS SECRETARY OF
INTERIOR, DEFENDANTS

UTAH SHARED ACCESS ALLIANCE, A UTAH NON-PROFIT
CORPORATION, ET AL., BLUE RIBBON COALITION, AN
IDAHO NONPROFIT CORPORATION, ELITE MOTOR-CYCLE
TOURS, A UTAH CORPORATION, AND ANTHONY
CHATTERLY, DEFENDANTS-INTERVENORS

Reporter's Transcript of Proceedings
Motion Hearing

[Aug. 30, 2000]

Volume I

BEFORE THE HONORABLE DALE A. KIMBALL

[Testimony of Ronald Bolander]

[508]

* * * *

Q. Okay. And you said that you obtained some guidance from Mr. Smith about the temporary aspect of plan—I'm sorry—the temporary aspects of the IMP rule?

A. That was discussion held with several of the team members.

Q. Okay. Was— what was your understanding about the temporary aspect of the IMP rule and how did you apply t?

[509]

A. The way it was applied was that any disturbances or anything like that, if there was a reasonable chance of reclamation occurring, natural reclamation which would not require assistance such as seeding or re-contouring or that sort of thing, I forget what the third one is, that if the area were able to heal itself, then that would be temporary. IMP to my understanding does not put a time frame on it.

Q. Okay. So it could be two year, five years, years? Did you have a time period in mind that it would be a temporary aspect of the rule?

A. No, we did not.

Q. So you didn't know what temporary meant?

A. Yes, we did.

Q. Tell me how long is temporary?

A. Temporary means that the effects will eventually —that the affects of some action will eventually dis-appear.

Q. In geologic time or can you put a year on it?

A. No. I mean, it depends on the action.

Q. Okay. Because all actions will presumably eventually disappear given a sufficient amount time; right?

A. Yeah, that's correct.

* * * *

[Testimony of Verlin Smith, BLM]

[605]

* * * *

Q. And you're aware of the nonimpairment standards of FLPMA; correct?

A. Yes.

Q. Is it your understanding that creation of new trails by off-road vehicle use would be an impairment or violation of the impairment standards of FLPMA if they were created after 1980?

A. Not necessarily of the impairment standards. We apply the impairment on a whole WSA basis. It would be inconsistent with the IMP where we try to keep authorized use just on inventoried routes.

* * * *

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

Case No. 2:99-CV-852K

SOUTHERN UTAH WILDERNESS ALLIANCE, A UTAH NON-PROFIT CORPORATION, THE SIERRA CLUB, A CALIFORNIA NON-PROFIT CORPORATION, THE GREAT OLD BROADS FOR WILDERNESS, A UTAH NON-PROFIT CORPORATION, WILDLANDS CPR, A MONTANA NON-PROFIT CORPORATION, UTAH COUNCIL OF TROUT UNLIMITED, A UTAH NON-PROFIT ORGANIZATION, AMERICAN LANDS ALLIANCE, A NATIONAL NON-PROFIT CORPORATION, THE FRIENDS OF THE ABAJOS, A UTAH NON-PROFIT CORPORATON, PLAINTIFFS

v.

BRUCE BABBITT, UNITED STATES DEPARTMENT OF INTERIOR IN HIS CAPACITY AS SECRETARY OF INTERIOR, TOM FRY, DIRECTOR, BUREAU OF LAND MANAGEMENT, AND THE BUREAU OF LAND MANAGEMENT, DEFENDANTS AND

UTAH SHARED ACCESS ALLIANCE, A UTAH NON-PROFIT CORPORATION, ET AL., DEFENDANTS-INTERVENORS

UNITED STATES RESPONSE
TO PLAINTIFFS' SUPPLEMENTAL BRIEFING RE:
SEVENTH CAUSE OF ACTION

"An agency's failure to prepare an SEIS is reviewed under § 706(1) of the APA, which requires the court to "compel agency action unlawfully withheld or unreasonably delayed. To prevail, plaintiff must show that defendants have refused to prepare an SEIS despite a clear legal duty to do so." *Oregon Natural*

Resources Defense Council Action v. United States Forest Service, 59 F. Supp.2d 1085, 1095 (W.D. Wash. 1999), citing *ONRC Action*, 150 F.3d at 1137.

BLM has recognized that OHV use on public lands generally has increased over the past few years and is taking significant steps to deal with the implications and effects on a national basis and within Utah. *See* US Memorandum at 15-19. Up to this point the agency has not yet made any formal determination as to whether any Utah land use plan or travel plan requires amendment or revision or the preparation of a supplemental EIS or EA; rather, it is taking broad planning steps and localized actions on the ground to deal with the immediate and long-term issues, while continuing to gather information.

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EARTHJUSTICE

February 8, 2002

United States Court of Appeals
for the Tenth Circuit
Office of the Clerk
Byron White United States Courthouse
Denver, CO 80257

Re: Notice of Supplemental Authority for *Southern Utah Wilderness Alliance v. Norton*, No. 01-4009

Dear Clerk:

Pursuant to Rule 28(j) of the Federal Rules of Appellate Procedure, I am writing to notify this Court of two pertinent and significant authorities that have come to my attention since the January 14 oral argument in this appeal.

The first authority is a February 13, 1998 order issued by the District of Montana in *Montana Wilderness Association v. United States Forest Service*, a copy of which is attached as Exhibit 1. In its reply brief in this Court, Southern Utah Wilderness Alliance (SUWA) pointed out that the District of Montana had used its power under 5 U.S.C. § 706(1) to address the Forest Service's failure to comply with the Montana Wilderness Study Area Act of 1977, which imposes a legal duty that is nearly identical to the non-impairment duty at issue in this appeal. *See* Appellants' Reply Brief at 5 (citing *Montana Wilderness Association v. United States Forest Service*, 146 F. Supp.2d

1118 (D. Mont. 2001), *appeal pending*). Exhibit A is an earlier order from *Montana Wilderness Association* in which the court denied a motion to dismiss in which the defendant-intervenors argued, just as does BLM in this appeal, that the court lacked jurisdiction to hear plaintiffs' claim. *See* Exh. at 3-5; Brief for Federal Appellees Gale Norton and Bureau of Land Management at 35-40. In rejecting the motion the Montana court held that it had jurisdiction to hear plaintiffs' non-impairment claim under 5 U.S.C. § 706(1). *Id.* at 4-5.

The second authority is related to a question that Judge Ebel asked at the January 14, 2002 oral argument. In discussing SUWA's supplemental NEPA, Judge Ebel asked about the magnitude of the increase in the number of ORV users in Utah. Counsel for SUWA were unable to answer at the time. Exhibit 2, which is a table showing the number of registered ORV users in Utah, responds to Judge Ebel's question to some degree. That table indicates that the number of registered ORV users (motorcycle and ATVs (all-terrain vehicles) in Utah was 83,054 in 2000, whereas the number of registered users was: (1) just over 9,000 in 1980 when the most recent NEPA analysis was done for the Parunaweap area; (2) 24,344 in 1985 when the most recent NEPA analysis was carried out for the Grand Resource Area; and (3) was 43,582 when the most recent NEPA analyses were prepared for the Indian Creek and San Rafael Swell areas. *See* Appellants' Opening Brief at 23-25 (describing most recent NEPA analyses for the areas addressed by SUWA's supplemental NEPA claim). While this table, which was provided by State of Utah, depicts the increase in the number of registered ORV users in the State, it does not account for the increase in the number of ORV

users who come to Utah from out-of-state. Nor does it account for ORV use by Utah citizens who choose not to register their vehicle with the State.

Respectfully,

James S. Angell
Attorney for Southern Utah Wilderness Alliance, et al.

* * * *

EXHIBIT 2

STEPHEN BLOCH, declares, as follows:

1. I am an attorney for Southern Utah Wilderness Alliance ("SUWA") and have held this position for three years. I have personal knowledge of each of the facts set forth below, and if called upon to do so, could and would testify regarding the following. This Declaration is filed in support of SUWA's Supplemental Authority in the above-captioned matter.

2. On January 31, 2002, I left a telephone message for Mr. Bill Thompson, the State of Utah, Department of Natural Resources, Division of State Parks and Recreation, Assistant off-highway vehicle coordinator, asking Mr. Thompson for a copy of the most current information regarding State of Utah off-highway vehicle registration figures.

3. Later on January 31, 2002, Mr. Thompson faxed me a copy of the document titled "ORV Registration

Numbers," and identified as Exhibit 1 to this Declaration.

4. On February 5, 2002, I spoke with Mr. Thompson and confirmed that Exhibit 1 indicates the number of motorcycles and ATVs (an identified sub-set of OHVs) registered in the State of Utah from 1972 to 2000. Mr. Thompson stated that the information displayed in Exhibit 1 was provided by the Utah State Tax Commission, the state governmental entity responsible for collecting OHV registration fees.

I DECLARE, under penalty of perjury, that the foregoing is true and correct.

/s/
Stèphen Bloch

Feb. 5, 2002
Date

OHV REGISTRATION NUMBERS			
YEAR	SNOWMOBILES	MOTORCYCLES/ ARVs	TOTAL
1972	8,195	2,048	10,243
1973	11,881	4,620	16,501
1974	12,067	6,477	18,544
1975	13,964	7,534	21,498
1976	16,207	8,065	24,272
1977	11,729	8,257	19,988
1978	16,207	9,262	25,469
1979	17,211	9,428	26,639
1980	16,612	9,094	25,706
1981	14,984	9,564	24,548
1982	17,016	10,986	28,002
1983	16,355	14,781	31,136
1984	16,439	20,901	37,340

1985	13,480	24,344	37,824
1986	13,091	27,565	40,656
1987	12,664	27,774	40,428
1988	12,654	26,898	39,552
1989	13,667	30,926	44,593
1990	12,776	34,010	46,786
1991	18,602	43,592	62,194
1992	14,092	48,582	62,674
1993	18,956	44,015	62,971
1994	18,833	47,509	66,342
1995	21,215	50,194	71,409
1996	22,593	56,839	79,432
1997	24,498	62,980	87,478
1998	26,912	51,744	77,656
1999	22,543	68,694	91,237
2000	27,894	83,054	110,948

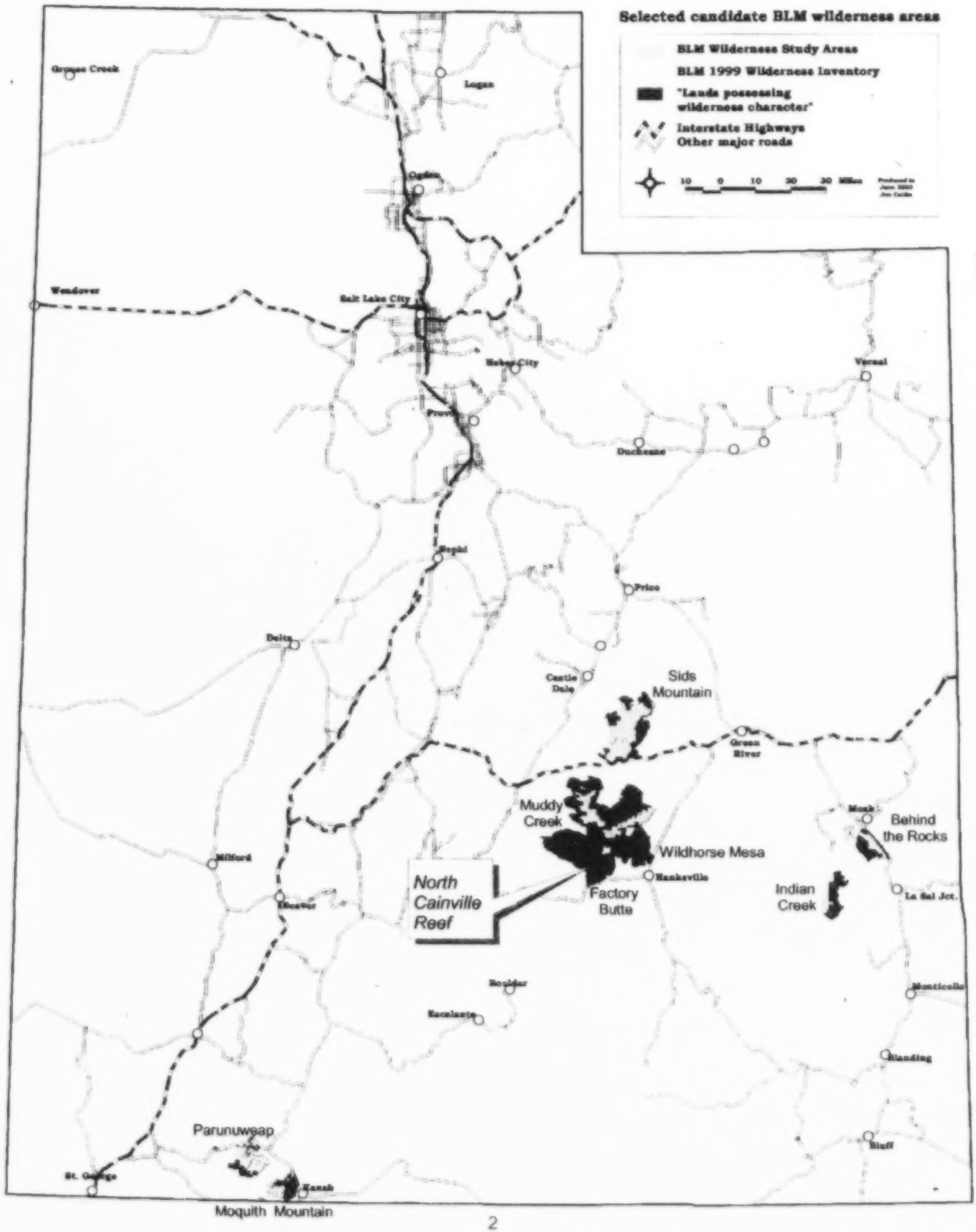
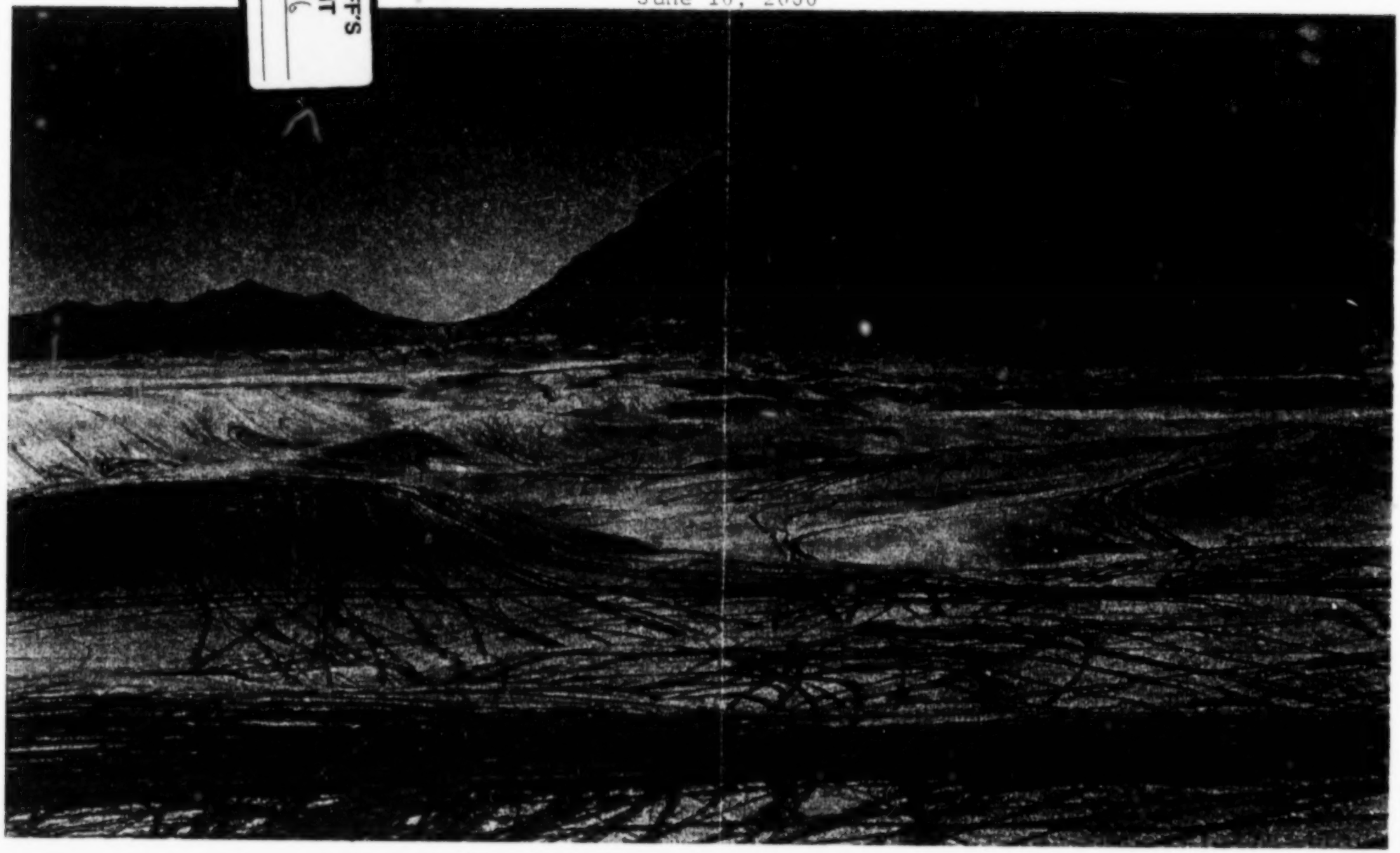

Selected candidate BLM wilderness areas
BLM Wilderness Study Areas
BLM 1999 Wilderness Inventory
"Lands possessing wilderness character"
Interstate Highways
Other major roads
Grouse Creek
Logan
Ogden
Wendover
Salt Lake City
Roosevelt
Vernal
Duchesne
Nephi
Price
Delta
Castle Dale
Sids Mountain
Green River
Muddy Creek
Wildhorse Mesa
Hanksville
Factory Butte
North Cainville Reef
Indian Creek
Behind the Rocks
La Sal Jct.
Monticello
Blanding
Bluff
Milford
Beaver
Boulder
Escalante
Parunuweap
St. George
Zion
Moquith Mountain

Figure 1



PLAINTIFF'S EXHIBIT
EXH # 36
CASE #

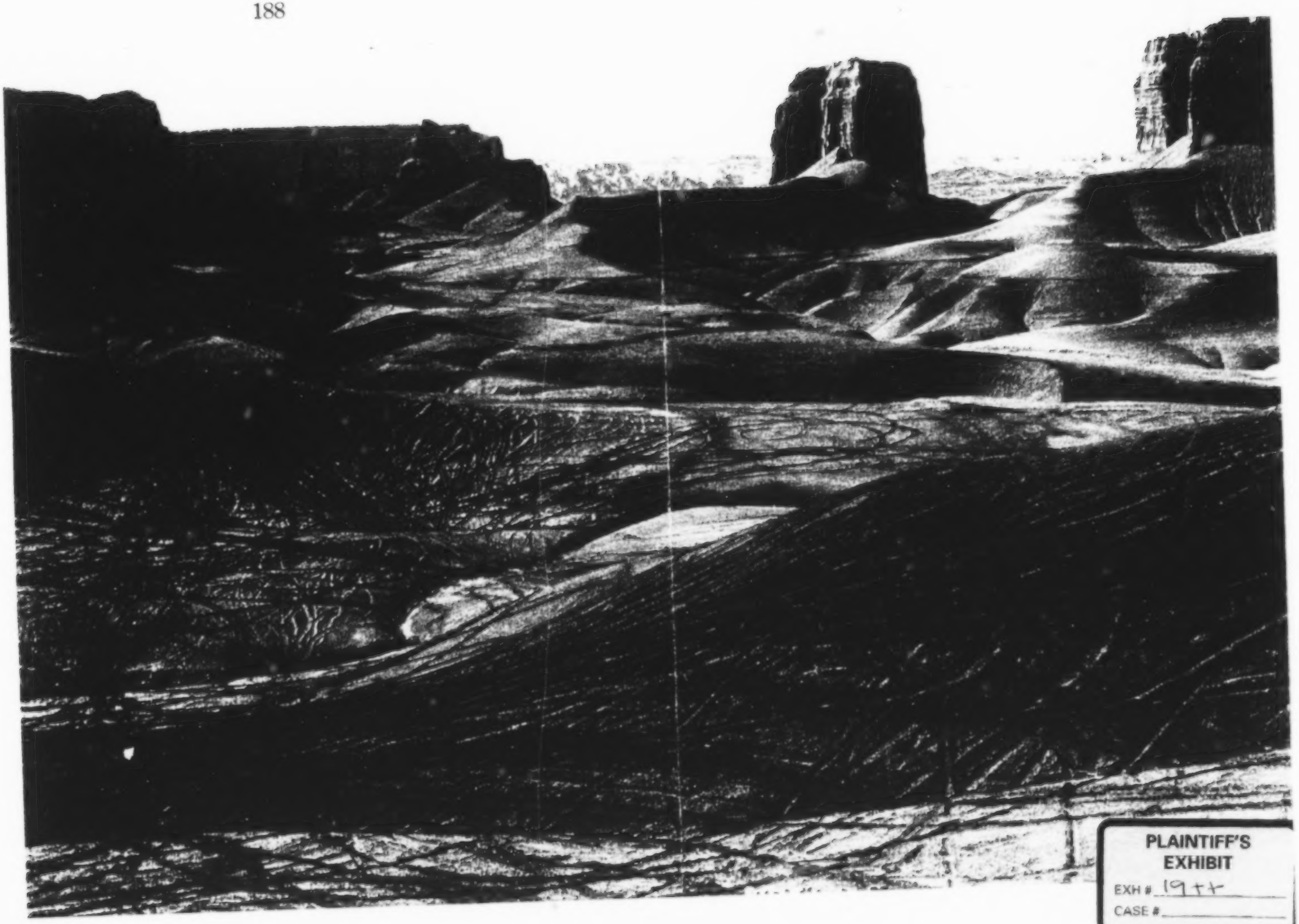
Muddy Creek-Crack Canyon 202 Unit
Factory Butte
June 10, 2000



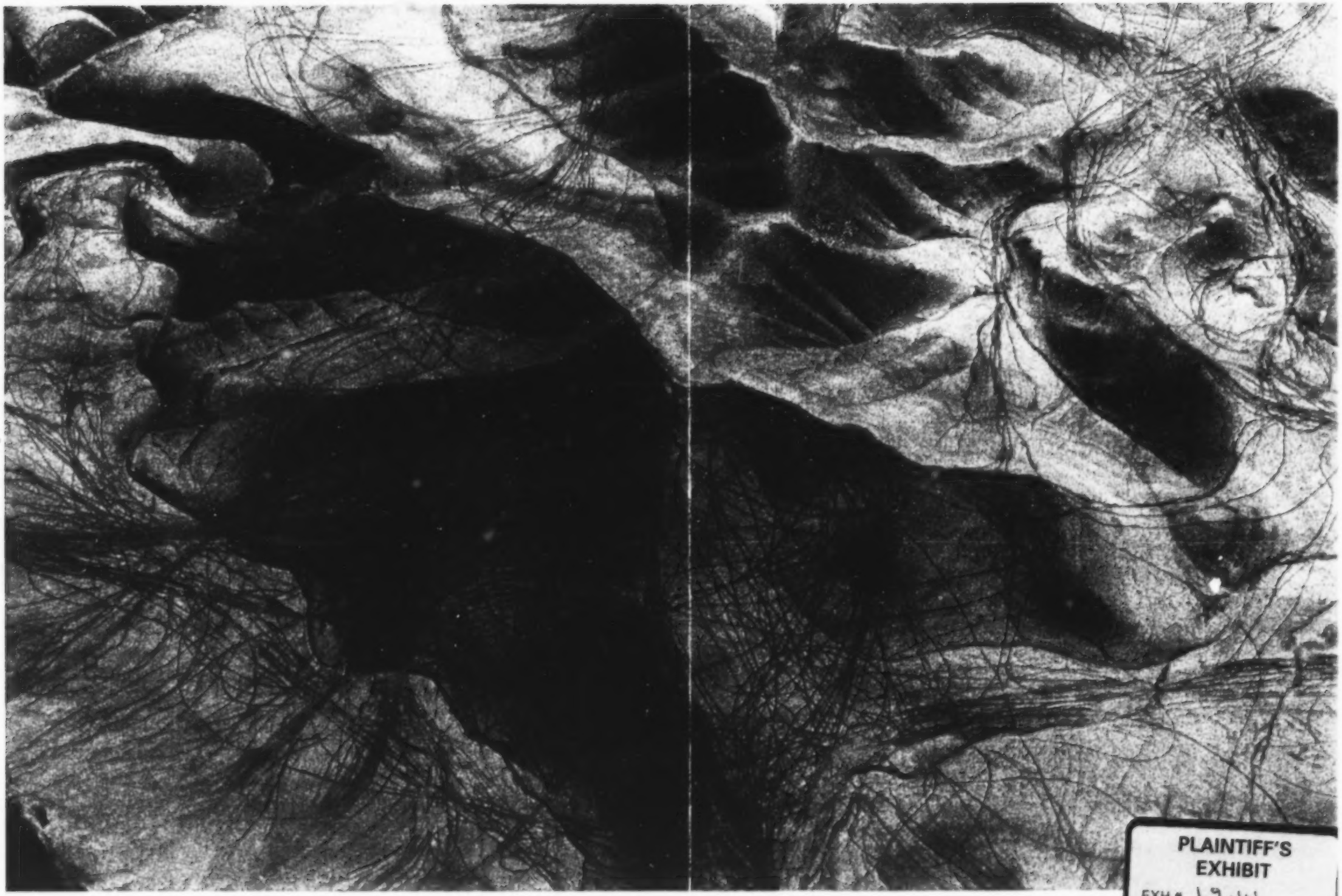


Wild Horse Mesa 202 Unit (June 10, 2000)

PLAINTIFF'S
EXHIBIT
EXH # SUIT
CASE #



PLAINTIFF'S
EXHIBIT
EXH # 194
CASE #



PLAINTIFF'S
EXHIBIT
EXH # 1900
CASE #

(14)

Supreme Court, U.S.
FILED
JAN 5 - 2004
Office of the Clerk

No. 03-101

In The
Supreme Court of the United States

GALE NORTON, SECRETARY,
DEPT. OF INTERIOR, et al.,

Petitioners,

v.

SOUTHERN UTAH WILDERNESS ALLIANCE, et al.,

and

UTAH SHARED ACCESS ALLIANCE, et al.,

and

STATE OF UTAH, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF FOR RESPONDENTS UTAH SHARED ACCESS ALLIANCE, ET AL.

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QUESTION PRESENTED

Whether a complainant can elect to bring an action against a federal agency under the Administrative Procedure Act, 5 U.S.C. § 706(1), to "compel agency action unlawfully withheld or unreasonably delayed" in situations where the agency has acted and continues to act on the legal duties in question.

PARTIES TO THE PROCEEDINGS

Pursuant to Supreme Court Rule 24.2, Respondents Utah Shared Access Alliance, et al., adopt Petitioners' identification of the parties, and note, by way of clarification, that there are three separate groups of Respondents who have taken distinct and often conflicting positions on the issues in this case. The first group of Respondents here (collectively "SUWA") were Plaintiffs in the District Court and Appellants in the Tenth Circuit:

1. Southern Utah Wilderness Alliance;
2. The Wilderness Society;
3. Sierra Club;
4. Great Old Broads for Wilderness;
5. Wildlands CPR;
6. Utah Council of Trout Unlimited;
7. American Lands Alliance; and
8. Friends of the Abajos.

The second group of Respondents here (collectively "USA-All") were Defendant-Intervenors in the District Court, Appellees in the Tenth Circuit, and Petitioners before this Court in No. 02-1703:

1. Utah Shared Access Alliance;
2. BlueRibbon Coalition;
3. Elite Motorcycle Tours; and
4. Anthony Chatterly.

PARTIES TO THE PROCEEDINGS – Continued

Pursuant to Supreme Court Rule 29.6, Respondents Utah Shared Access Alliance, BlueRibbon Coalition and Elite Motorcycle Tours hereby disclose that they are nongovernmental corporations, but do not have any publicly issued shares and further disclose there is no parent or publicly held company owning 10% or more of the stock of any of these corporate Respondents.

The third group of Respondents here were Defendant-Intervenors in the District Court and Appellees in the Tenth Circuit:

1. State of Utah;
2. San Juan County, Utah;
3. Emery County, Utah;
4. Kane County, Utah;
5. Wayne County, Utah;
6. Utah School and Institutional Trust Lands Administration.

TABLE OF CONTENTS

	Page
Question Presented	i
Parties to the Proceedings	ii
Table of Authorities	v
Statement of the Case	1
Summary of Argument	9
Argument	10
A. The Tenth Circuit Decision Improperly Expands APA Section 706(1) Review and Allows Complainants to Bypass Review of Final Agency Action	10
B. The Tenth Circuit Approach Will Discourage and Nullify Participation in the Administrative Process	17
Conclusion	21

TABLE OF AUTHORITIES

Page

CASES

American Farm Bureau v. U.S. EPA, 121 F.Supp.2d 84 (D.D.C. 2000) 11

Atchison, Topeka & Santa Fe Railway Co. v. Wichita Bd. of Trade, 412 U.S. 800 (1973) 18

Bennett v. Spear, 520 U.S. 154 (1997) 10

Camp v. Pitts, 411 U.S. 138 (1973) 19

Ecology Center v. U.S. Forest Service, 192 F.3d 922 (9th Cir. 1999) 11

Friends of the Clearwater v. Dombeck, 222 F.3d 552 (9th Cir. 2000) 19

Glisson v. U.S. Forest Service, 55 F.3d 1325 (7th Cir. 1995) 17

Hall v. Baker, 867 F.2d 693 (D.C. Cir. 1989) 18

Lujan v. Nat'l Wildlife Federation, 497 U.S. 871 (1990) 10, 11, 12

McKart v. United States, 395 U.S. 185 (1969) 17, 18

Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Automobile Ins. Co., 463 U.S. 29 (1983) 10

Ohio Forestry Ass'n v. Sierra Club, 523 U.S. 726 (1998) 3, 13, 14

ONRC Action v. Bureau of Land Management, 150 F.3d 1132 (9th Cir. 1998) 11

Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941) 20

Public Citizen Health Research Group v. Comm'r, Food & Drug Admin., 740 F.2d 21 (D.C. Cir. 1984) 11

TABLE OF AUTHORITIES – Continued

Page

Public Citizen v. Nuclear Regulatory Comm'n, 845 F.2d 1105 (D.C. Cir. 1988) 12

Sierra Club v. Peterson, 228 F.3d 559 (5th Cir. 2000), *cert. denied*, 532 U.S. 1051 (2001) 11, 12

STATUTES AND REGULATIONS

5 U.S.C. § 702 ..... 5, 10

5 U.S.C. § 704 ..... 5, 10

5 U.S.C. § 706(1) ..... *passim*

5 U.S.C. § 706(2) ..... *passim*

5 U.S.C. § 706(2)(A) and (C) 13

43 U.S.C. § 1712 4

43 C.F.R. part 4 5

43 C.F.R. §§ 4.410-4.411 5

43 C.F.R. § 1601.0-5(k) 4

43 C.F.R. § 1610.2 4

43 C.F.R. § 1610.5-2 5

43 C.F.R. § 1610.5-5 4

43 C.F.R. § 1610.5-6 4

43 C.F.R. § 8340.0-5 ..... 1, 4

43 C.F.R. § 8341.2(a) 5

43 C.F.R. § 8342.1 ..... 4, 14

43 C.F.R. § 8342.2(a) 4

43 C.F.R. § 8364.1 5

43 C.F.R. § 8364.1(a) 5

TABLE OF AUTHORITIES – Continued

Page

MISCELLANEOUS

63 Fed.Reg. 110 (January 2, 1998) 6

65 Fed.Reg. 15169 (March 21, 2000) 14

65 Fed.Reg. 15169-15170 (March 21, 2000) 7

65 Fed.Reg. 19921 (April 13, 2000) 7

65 Fed.Reg. 52437 (August 29, 2000) 8

66 Fed.Reg. 55202 (November 1, 2001) 6

66 Fed.Reg. 56343-56344 (November 7, 2001) 6

66 Fed.Reg. 6659-6661 (January 22, 2001) 8

68 Fed.Reg. 33526 (June 4, 2003) 6

68 Fed.Reg. 33527 (June 4, 2003) 6

Supreme Court Rule 24.2 ii

Supreme Court Rule 29.6 iii

STATEMENT OF THE CASE

This case involves an effort to compel proper action by the Bureau of Land Management ("BLM") regulating off-road vehicle access in Utah.[1] Respondents USA-All support the position of Petitioners, have reviewed Petitioners' Statement in their Petition for Writ of Certiorari, and are likely to join in Petitioners' Statement in their merits brief. Since counsel has been unable to review that Statement but must submit a brief supporting Petitioners' position contemporaneously with the filing of Petitioners' brief, this Statement will avoid a complete description of the facts and proceedings below. Instead, this Statement will more fully describe the nature and extent of the agency activity addressing off-highway vehicle access to public lands in Utah.

1. On October 27, 1999, Plaintiffs-Respondents Southern Utah Wilderness Alliance, et al. ("SUWA") filed a complaint in the United States District Court for the District of Utah against the Secretary of the Department of Interior, the Bureau of Land Management ("BLM") and the Director of BLM, alleging that BLM had "'failed to perform its statutory and regulatory duties' by not preventing harmful environmental effects associated with off-road vehicle use" on BLM-managed federal lands. Pet. Ap. at 3a.

---

[1] The term "off road vehicle" ("ORV") is used in BLM regulations and typically refers to motorized vehicles ranging from full size pickups, sport utility vehicles and jeeps to all-terrain vehicles to motorcycles, all "capable of, or designed for, travel on or immediately over land . . . or other natural terrain. . . ." 43 C.F.R. § 8340.0-5.

The complaint advanced ten (10) separate claims for relief, all seeking judicial review solely under section 10(e)(A) of the Administrative Procedure Act (the "APA"), codified at 5 U.S.C. § 706(1) ("APA section 706(1)"). Pet. Ap. at 3a. According to SUWA's theory, BLM was failing to take action in complete conformance with the Federal Land Policy and Management Act ("FLPMA") to prevent ORV "impairment" of Wilderness Study Areas, was failing to take sufficient action to implement certain provisions of applicable land management plans, and was failing to supplement certain environmental analyses regarding ORV use. *Ibid.* SUWA acknowledged that BLM had taken actions to address ORV management in the areas at issue, but characterized these efforts as "half steps" upon the applicable legal duties. See Pet. Ap. at 66a. SUWA therefore sought to "compel" BLM management action they believed to be "unlawfully withheld or unreasonably delayed."

The district court heard, and dismissed for lack of subject matter jurisdiction, claims brought through a motion for preliminary injunction.[2] SUWA's preliminary injunction focused on BLM ORV management at nine (9) discrete areas in Utah. Four (4) of the areas are WSAs, known as the Parunuweap WSA, Moquith Mountain WSA, Behind the Rocks WSA, and Sids Mountain WSA. Pet. Ap. at 61a. At these areas SUWA argued BLM was failing to sufficiently act on FLPMA's "nonimpairment" mandate, and further argued the agency was "failing to consistently

[2] Respondents USA-All filed the only motion to dismiss SUWA's claims, which was generally supported but not joined by BLM below. See Pet. Ap. at 57a.

implement the terms of its land use management plans" and was failing to act in accordance with BLM's general ORV management regulations. *Ibid.*

The other areas at issue were "Section 202 areas," including "lands adjacent to the Parunuweap, Behind the Rocks, and Indian Creek WSAs, as well as areas around Factory Butte, North Caineville Reef, and Wildhorse Mesa." Pet. Ap. at 71a. At these areas SUWA argued BLM was failing to act in accordance with its land use plans, BLM's general vehicle planning regulations, and regulations addressing a duty to supplement existing National Environmental Policy Act analyses. *Id.* at 72a.

2. The agency here has acted and continues to act on its legal duties to monitor and regulate vehicle access on BLM-managed lands. These actions occur on various levels in the tiered administrative planning process.[3] In general terms, such actions can occur through broad-scale "program level" planning, as well as more narrow and focused sites/issues through separate "project level" planning. See generally *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 729-730 (1998) (discussing relationship between program level and project level planning for U.S. Forest Service). BLM follows an analogous process, since Congress, through FLPMA, has directed BLM to prepare "land use

[3] Neither the Tenth Circuit nor District Court decisions present a detailed description of BLM's management actions. The Tenth Circuit decision generally summarizes some of the actions, but does not address the legal basis for, and significance of, these final agency actions, but instead focuses on the implementation aspects of the various orders, such as signing and visitor education efforts. Pet. Ap. at 19a n.11.

plans" which BLM refers to as resource management plans ("RMPs"). 43 U.S.C. § 1712; 43 C.F.R. § 1601.0-5(k). An RMP is a written document outlining broad goals and directives, such as "allowable resource uses," "resource condition goals and objectives to be attained," "need for an area to be covered by more detailed and specific plans," and "intervals and standards for monitoring and evaluating the plan. . . . " *Ibid.* The public "shall be provided opportunities to meaningfully participate in and comment on . . . " RMP development, and RMPs are generated only after circulation of an environmental impact statement and other procedures as required by the National Environmental Policy Act. 43 C.F.R. § 1610.2.

BLM is also authorized and directed to more specifically address off-road vehicle planning, including project level planning. BLM "shall designate all public lands as either open, limited or closed to off-road vehicles." 43 C.F.R. § 8342.1. Such designations are to be based on specified criteria, including the minimization of impacts "to soil, watershed, vegetation, air, or other resources of the public lands, and to prevent impairment of wilderness suitability." *Id.* at (a). This designation occurs through the RMP planning process, but can be reconsidered or more specifically addressed through the ongoing process of revising or amending the applicable RMP. 43 C.F.R. § 8342.2(a); 43 C.F.R. § 1610.5-5 (amendment); 43 C.F.R. § 1610.5-6 (revision). Thus, BLM conducts an open and forward-looking planning process addressing vehicle access "in a manner that provides an opportunity for the public to express itself and have its views given consideration." 43 C.F.R. § 8342.2(a).

In specified circumstances, BLM may also take more immediate action to regulate vehicle access. Upon a

finding that "off-road vehicles are causing or will cause considerable adverse effects upon soil, vegetation, wildlife, wildlife habitat, cultural resources, historical resources, threatened or endangered species, wilderness suitability, other authorized uses, or other resources . . . " the applicable BLM official "shall immediately close the areas affected to the type(s) of vehicle causing the adverse effect until the adverse effects are eliminated and measures implemented to prevent recurrence." 43 C.F.R. § 8341.2(a). Such orders may be issued outside the public planning process, although the presence of such an "emergency" order does not prevent further analysis through further public planning. *Ibid.* BLM is also authorized to issue "closure and restriction orders" as necessary "[t]o protect persons, property, and public lands and resources. . . . " 43 C.F.R. § 8364.1(a). The applicable regulation states only that such orders be posted at specified places and published in the Federal Register, but does not clarify how such orders relate to the ongoing planning process or the "emergency" orders authorized under section 8341.2(a). 43 C.F.R. § 8364.1.

Aggrieved participants in any BLM planning process have the option of pursuing administrative review of the agency's decision. For RMPs, participants in the planning process can file a protest which will ultimately be decided by the Director of BLM. 43 C.F.R. § 1610.5-2. Other decisions, such as those adopting vehicle designation plans, are typically subject to protest and/or administrative appeal. 43 C.F.R. §§ 4.410-4.411 (describing decisions subject to appeal); 43 C.F.R. part 4, subpart B (prescribing general rules for BLM appeals). Those dissatisfied by the results of such administrative review may pursue judicial review under the APA. 5 U.S.C. §§ 702, 704.

BLM has previously issued RMPs or equivalent land use plans for all the areas at issue in this action, and is in the process of revising those plans. For instance, the agency published notice of intent to RMP revisions for the Moab and Monticello Field Offices, which manage a total of about 2.46 million acres of public lands, including many lands addressed by this action. 68 Fed.Reg. 33526 (June 4, 2003); http://www.moabrmp.com. Numerous public meetings and opportunities for input will occur during this process, which will consider BLM direction for virtually all management issues, including "access to and transportation on the public lands." 68 Fed.Reg. 33527 (June 4, 2003). The Price Field Office has issued a similar notice, indicating it is generating an RMP for the approximately 2.5 million acres of lands it manages. 66 Fed.Reg. 56343-56344 (November 7, 2001); http://www.pricermp.com. The same is true of the Richfield Field Office, whose RMP will address approximately 2.2 million acres of BLM-managed lands. 66 Fed.Reg. 55202 (November 1, 2001); http://www.richfieldrmp.com. Thus, interested members of the public, including all Respondents in this case, can actively participate in the ongoing planning process in the hopes of influencing BLM's programmatic management direction for the lands at issue here.

BLM has also issued numerous project level decisions affecting vehicle access to specific areas targeted in SUWA's preliminary injunction motion. Prior to the filing of this action, BLM issued vehicle and camping restrictions in the Indian Creek Canyon Corridor. In part, these restrictions limited all motor vehicle and mountain bike travel to "existing roads and trails." 63 Fed.Reg. 110 (January 2, 1998). During the early stages of the case, the Price Field Office issued a "temporary emergency closure"

addressing all seven (7) WSAs within its jurisdiction. 65 Fed.Reg. 15169-15170 (March 21, 2000). This order completely prohibited vehicle access within six of the seven areas, and limited vehicle travel in the remaining Sids Mountain WSA to four (4) designated routes. *Id.* at 15170. The Federal Register notice partially describes the basis for this order, stating "[t]he impairment of wilderness values necessitates this emergency closure order in the seven WSAs. . . . " *Ibid.*; see also Tr. at 134-165 (district court testimony of Price Field Office Manager describing decision and implementation efforts). To aid implementation and enforcement efforts, BLM, with the assistance of varied local interest groups, installed "about 266 signs, . . . 19 barricades comprised of 97 segments of buck and pole fence to the tune of about 2000 feet and 12 kiosks or information bulletin boards that have been placed . . . " in the Sids Mountain WSA. Tr. at 676.

The BLM Kanab Field Office conducted a public planning process over several years which ultimately led to adoption of a land use plan amendment covering the Moquith Mountain area, including the Coral Pink Sand Dunes. 65 Fed.Reg. 19921 (April 13, 2000). This decision, adopted following an environmental assessment and finding of no significant impact in accordance with the National Environmental Policy Act, addressed a variety of issues including sensitive species and vehicle management. *Ibid.*; see also Tr. at 387-403 (testimony of planning team leader describing planning process). As a result of this decision, "[o]ver 95 percent of the WSA is closed to [ORV] use." *Id.* at 407. The Kanab Field Office subsequently issued additional "temporary emergency [ORV] travel limitations" restricting travel within three (3) WSAs "to only those travel routes and ways identified during the

original wilderness inventory completed in 1980 and shown on the inventory maps. . . . " 65 Fed.Reg. 52437 (August 29, 2000).

The BLM Moab Field Office has completed similar management efforts. Through either the applicable RMP or through additional closure orders, travel within the Behind the Rocks WSA "is limited to the inventoried ways that were part of the WSA inventory." Tr. at 37. Like other offices, the Moab office conducts ongoing monitoring and on-the-ground implementation efforts. Tr. at 218-237. The Moab Office also issued an extensive "interim" restriction order revising previous "open" travel designations and requiring travel to be limited to existing roads and trails on approximately 245,642 acres, and implementing closures to vehicle access at other specified locations. 66 Fed.Reg. 6659-6661 (January 22, 2001).

In at least some instances, BLM has revisited the "temporary" restrictions outlined above and has addressed vehicle access issues through a more thorough public planning process. For example, the Price Field Office has completed the San Rafael Route Designation Plan, which analyzed vehicle access issues throughout the Price Field Office, including the seven WSAs covered by the March, 2000, closure order. BLM Decision Summary, http://www.ut.blm.gov/sanrafaelorv.wthedecision.htm. This decision authorizes continued ORV travel along 677 miles of "secondary [ORV] routes" while closing 468 miles of routes to vehicle access. *Ibid.* The Route Designation Plan reanalyzed and left in place the March, 2000, management scheme for the Price Field Office WSAs. *Ibid.*

As is the case with most agency decisions, BLM's have been anything but universally accepted. However, at least

in BLM's assessment, the management actions have prevented impairment and allowed the WSAs to retain whatever wilderness values they possessed upon designation. See, e.g., Tr. at 47-48 (estimating impacts to Behind the Rocks WSA "to equate to about a 2/100 of a percent of the overall area" and concluding this level of impact is "insignificant in terms of the ability to designate it as wilderness."). BLM has certainly taken action to manage vehicle access, and will continue to do so during and beyond this litigation.

SUMMARY OF ARGUMENT

The Tenth Circuit's holding would significantly expand APA section 706(1) jurisdiction. The Tenth Circuit majority's new jurisdictional analysis will have dramatic practical consequences for all involved in the use and management of the lands in question. The consequences of this new relationship between administrative agencies, courts and the public will potentially extend beyond the specific context of this case into any relationships defined by the APA. This Court should reject the Tenth Circuit majority's approach and confine APA section 706(1) review to the appropriate situations where the agency has genuinely failed to act on plainly-prescribed legal duties.

ARGUMENT

A. The Tenth Circuit Decision Improperly Expands APA Section 706(1) Review and Allows Complainants to Bypass Review of Final Agency Action.

The Tenth Circuit majority's decision would dramatically and unjustifiably expand APA section 706(1) review. Petitioners have properly noted many of the legal flaws in this approach. In particular, the Tenth Circuit majority's analysis of section 706(1) cannot be squared with this Court's guidance in *Lujan v. Nat'l Wildlife Federation*, 497 U.S. 871 (1990). *Lujan* does not specifically mention APA section 706(1), but counsels that judicial review under the APA proceeds according to a "case-by-case approach" which "is the traditional, and remains the normal, mode of operation of the courts." *Lujan*, 497 U.S. at 894.

1. The starting point in the jurisdictional analysis is whether the agency has taken "final agency action." *Lujan*, 497 U.S. at 882-883 (analyzing APA provisions at 5 U.S.C. §§ 702, 704 limiting judicial review to "final agency action" presented by a party "suffering legal wrong" or "adversely affected or aggrieved by agency action within the meaning of a relevant statute . . . "). "Final agency action" occurs when the action "mark[s] the 'consummation' of the agency's decisionmaking process" and when the action is "one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow'. . . . " *Bennett v. Spear*, 520 U.S. 154, 177-178 (1997) (citations omitted). Where a claimant properly challenges final agency action, the reviewing court will analyze the claim under the "arbitrary and capricious" review standard. 5 U.S.C. § 706(2); *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 43 (1983). Under this

approach, the judiciary "intervene[s] in the administration of the laws only when, and to the extent that, a specific 'final agency action' has an actual or immediately threatened effect." *Lujan*, 497 U.S. at 894.

The parallels between the *Lujan* analysis of the "final agency action" requirement and section 706(1) review have been noted by many courts, for *Lujan* is frequently discussed in cases considering the availability of section 706(1) review. See, e.g., *Sierra Club v. Peterson*, 228 F.3d 559, 566-567 (5th Cir. 2000), *cert. denied*, 532 U.S. 1051 (2001); *ONRC Action v. Bureau of Land Management*, 150 F.3d 1132, 1135-1136 (9th Cir. 1998); *American Farm Bureau v. U.S. EPA*, 121 F.Supp.2d 84, 102-103 (D.D.C. 2000). These decisions reject efforts like SUWA's as attempting the flawed strategy of "challeng[ing] an entire program by simply identifying specific allegedly-improper final agency actions within that program. . . . " *Peterson*, 228 F.3d at 567.

2. The Tenth Circuit majority's reasoning also fails to recognize the jurisdictional significance of BLM's actions on the relevant legal duties. The section 706(1) cause of action exists in large part to prevent an agency from avoiding review entirely by failing to do anything, for "[w]hen agency recalcitrance is in the face of clear statutory duty or is of such a magnitude that it amounts to an abdication of statutory responsibility, the court has the power to order the agency to carry out its substantive statutory mandates." *Public Citizen Health Research Group v. Comm'r, Food & Drug Admin.*, 740 F.2d 21, 32 (D.C. Cir. 1984). A proper section 706(1) claim must identify "a genuine failure to act" as opposed to "complaints about the sufficiency of an agency action 'dressed up as an agency's failure to act.'" *Ecology Center v. U.S.*

Forest Service, 192 F.3d 922, 926 (9th Cir. 1999) (quoting *Nevada v. Watkins*, 939 F.2d 710, 714 n.11 (9th Cir. 1991)); see also *Public Citizen v. Nuclear Regulatory Comm'n*, 845 F.2d 1105, 1108 (D.C. Cir. 1988) ("Almost any objection to an agency action can be dressed up as an agency's failure to act."). Similarly, in a characterization closely tracking the District Court's reasoning in this case, the *Peterson* en banc majority rejected the failure to act claim before it, observing "the Forest Service has been acting, but the environmental groups simply do not believe its actions have complied with the [National Forest Management Act]." *Peterson*, 228 F.3d at 568. Noting the "concern that finding no final agency action here 'would put all of the Forest Service's on-the-ground violations ... beyond review'" the Fifth Circuit majority noted that *Lujan* and other cases direct claimants to "challenge discrete site-specific sales allowed by the Forest Service." *Ibid.*

The Tenth Circuit majority failed to properly understand and apply these principles. The weakness of the Tenth Circuit majority's reasoning is epitomized by footnote twelve of its opinion. Footnote twelve presents a hypothetical in which Congress prohibited all logging in a national forest, but the agency took action to prohibit logging in only half the forest, while allowing logging in the other half. Pet. Ap. at 20a n.12. The majority reasons that this hypothetical demonstrates the illogic of allowing section 706(1) jurisdiction to turn on the mere existence of "partial" agency action, which in the hypothetical is compared to the agency's compliance with only "half" of the applicable legal direction. *Ibid.*

Footnote twelve is flawed on several levels and ignores basic tenets of APA jurisdiction. The choice of a logging-oriented hypothetical is ironic, for in that specific

context this Court has noted that actual on-the-ground activity cannot occur absent both program- and project-level agency decisions affirmatively authorizing the activity. *Ohio Forestry*, 523 U.S. at 729-730. *Ohio Forestry* summarized the second step as having five (5) distinct components, the last of which is the right to challenge the agency decision "in an administrative appeals process and in court." *Id.* at 730. Certainly the existence of the hypothetical legal directive to prohibit logging could be a central component of such an attack on either the program level or project level decision, for one might reasonably, if not persuasively, argue that an agency decision to proceed with activity prohibited by Congress would constitute "agency action ... not in accordance with law" or "in excess of statutory jurisdiction, authority, or limitations.... 5 U.S.C. § 706(2)(A) and (C). Thus, a proper party has ample opportunity to challenge the hypothetical agency decision at issue, but such challenge should, and must, proceed via APA section 706(2). The Tenth Circuit majority ignored the availability of section 706(2) review in erroneously concluding that 706(1) review should be available to plaintiffs creative enough to characterize agency action as mere "half steps" to some broad statutory goal.

SUWA counters these jurisdictional limits on section 706(1) with unfounded fears they will create a jurisdictional vacuum. Specifically, SUWA claims it cannot bring its "nonimpairment" claims in a challenge to BLM's alleged management "half steps" because SUWA's "case challenges BLM's failure to impose just such restrictions." Brief in Op. to Pet. at 17 n.9. This argument is incorrect. All vehicle access on BLM lands flows from some affirmative agency decision. Even at the broadest programmatic

level, BLM must designate areas as "either open, limited or closed to off-road vehicles." 43 C.F.R. § 8342.1. *Ohio Forestry* offers guidance here. In particular, a program level decision to allow, or prohibit, activity which allegedly has immediate concrete effect on a party can form the basis for administrative and judicial review. *Ohio Forestry*, 523 U.S. at 738-739 (discussing Solicitor General's concession at argument that land use plan decision to close an area to vehicle use, or to "allow[ ] motorcycles into a bird-watching area or something that like, that would be immediately justiciable"). In a decision like an RMP, BLM must consider and apply the nonimpairment mandate and numerous other applicable statutes, in determining whether to allow, prohibit, or limit vehicle access throughout the *entire* planning area. An aggrieved party advocating or opposing vehicle access could challenge the agency's decision on any acre of the planning area, but such review must proceed under APA section 706(2).

Interested parties have even clearer opportunities for review when the agency takes project level action. SUWA's ability to challenge BLM's "nonimpairment" decisions is aptly demonstrated by BLM's actions addressing WSAs in the Price Field Office. On March 21, 2001, BLM issued a "temporary emergency closure" affecting all seven (7) WSAs administered by that office. 65 Fed.Reg. 15169 (March 21, 2000). This action prohibited all vehicle access to six (6) of the seven areas, and limited vehicle travel in the remaining area to four (4) designated routes "on a conditional basis ... contingent upon the success of a

rehabilitation and monitoring plan.... " *Id.* at 15170.[4] Certainly SUWA could have challenged the decision to allow access to continue on the four routes, just as USA-All could have challenged the decision to eliminate access in the remainder of the WSAs. Such challenges would proceed under APA section 706(2) and would focus on the agency record and the manner in which the agency reached and articulated the basis for its decision. SUWA is well aware of this option, having previously prosecuted, and succeeded upon, an administrative appeal to a similar BLM decision affecting the Moquith Mountain WSA. *Southern Utah Wilderness Alliance*, 142 IBLA 164 (1998). That appeal contains legal claims virtually identical to those presented in this case, for in the Moquith Mountain appeal "[w]hile [SUWA] concedes that the BLM Management Schedule 'offers some small steps in the right direction,' ([appeal Statement of Reasons] at 6), it challenges those aspects of the Decision which permit *any* continued ORV use in the WSA, in the face of what it claims to be ongoing impairment to the wilderness values in the area." *Id.* at 169 (emphasis added). One dissatisfied with the outcome of the administrative review process could seek judicial review as outlined in the APA and *Lujan*. SUWA can, and has, challenged BLM's decision to allow vehicle

[4] This "temporary emergency closure" has been continued by further final agency action in the form of the Price Field Office's San Rafael Route Designation Plan, which, aside from the WSA restrictions, allows travel to continue on 677 miles of "secondary OHV routes" while closing 468 miles of other routes. BLM Decision Summary, http://www.ut.blm.gov/sanrafaelohv/wthedecision.htm. SUWA is well aware of this Decision, as well as its right to challenge the same via administrative appeal. Brief in Op. to Pet. at 19 and n.12.

access to continue, just as logging opponents could challenge the agency's decision to allow logging on the "other half" of the Tenth Circuit majority's hypothetical forest. There exists jurisdiction under APA section 706(2) for such claims to proceed.

Participants in the kaleidoscopic public lands debate have ample opportunity to challenge agency decisions affecting their varied interests. Until now, such challenges proceeded under APA section 706(2), in which a reviewing court focused on the administrative record before the agency and the agency's ability to articulate the basis for its decision, with due deference accorded administrative discretion and expertise. APA section 706(1) was generally understood to parallel mandamus review in the context of the APA, and was utilized in the rare instance when an agency utterly failed to take any action where it lacked discretion as to whether action was required or failed to act on a plainly prescribed legal duty. The Tenth Circuit majority's approach here would dramatically alter this view, and would allow creative plaintiffs to "dress up" a challenge to the sufficiency of any agency action as the agency's "failure to act." This result would allow litigants to effectively bypass the "arbitrary and capricious" review of APA section 706(2) in the hopes that a single district court judge might be more sympathetic to the claim that the agency had "unreasonably delayed" complete compliance with some statutory directive. This Court should reject this shift, and clarify that when an agency takes action to implement its statutory duties, as BLM did here, APA section 706(2) presents the sole method by which an aggrieved party can challenge the agency's decision.

B. The Tenth Circuit Approach Will Discourage and Nullify Participation in the Administrative Process.

The obvious consequence of the Tenth Circuit majority's new rule will be to encourage more frequent and even more creative use of APA section 706(1) by special interests seeking to influence the management balance sought by administrative agencies.

The modern administrative state depends on the premise that agencies will be delegated meaningful authority within the realm of their specialized expertise. In order to exercise that authority, agencies must promulgate and apply procedures and regulations designed to ensure appropriate involvement of the regulated parties in administrative decisionmaking. Courts evaluating actions under the APA regularly consider the nature of the administrative process. While such discussion often occurs when applying the doctrine of exhaustion of administrative remedies, it is relevant here in describing the proper role of the administrative process. Many of the related jurisdictional doctrines such as finality, ripeness, mootness and exhaustion reflect the need to respect the administrative process and to "postpone judicial intervention until the plaintiff's need for judicial help is clear and the record is adequate to enable the intelligent performance of the judicial function." *Glisson v. U.S. Forest Service*, 55 F.3d 1325, 1327 (7th Cir. 1995). Agencies should be provided some latitude to perform their delegated functions, "[a]nd since agency decisions are frequently of a discretionary nature or frequently require expertise, the agency should be given the first chance to exercise that discretion or to apply that expertise." *McKart v. United States*, 395 U.S. 185, 194 (1969). Particularly in such instances "[t]he

courts ordinarily should not interfere with an agency until it has completed its action, or else has clearly exceeded its jurisdiction." *Ibid.*

It is generally proper to confine judicial review to final agency decisions, for courts "must rely on the rationale adopted by the agency if we are to guarantee the integrity of the administrative process. Only in that way may we 'guard against the danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy.'" *Atchison, Topeka & Santa Fe Railway Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 807 (1973) (citations omitted, quoting *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941)). Withholding premature review helps maintain the proper relationship between the courts and agencies, as "notions of administrative autonomy require that the agency be given a chance to discover and correct its own errors." *McKart*, 395 U.S. at 195. Unjustified judicial review through "frequent and deliberate flouting of administrative processes could weaken the effectiveness of an agency by encouraging people to ignore its procedures." *Ibid.*

For agencies like BLM which regulate and regularly interact with the general public, it is critical to maintain an open and respectful dialogue regarding the agency's conduct and rationale for any restrictions on the public. Agency decisions must be carefully disclosed and discussed in a public planning process, because "it is also a familiar (and fundamental) tenet of administrative law that '[t]he failure to admit or explain . . . a basic change in the interpretation of a statutory standard to be applied to conduct of the public undermines the integrity of the administrative process.'" *Hall v. Baker*, 867 F.2d 693, 696

(D.C. Cir. 1989) (quoting *Hatch v. Federal Energy Regulatory Comm'n*, 654 F.2d 825, 835 (D.C. Cir. 1981)) (bracketing and elipses in *Hall*).

The Tenth Circuit majority's jurisdictional rule reflects or promotes these evils. As a section 706(1) claim ostensibly challenges the agency's failure to act, some courts have held "review is not limited to the record as it existed at any single point in time, because there is no final agency action to demarcate the limits of the record." *Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 560 (9th Cir. 2000). This situation effectively diminishes the level of deference accorded agency determinations, while allowing plaintiffs to freely submit evidence that might be excluded in section 706(2) review confined to the record before the agency at the time of the decision. See *Camp v. Pitts*, 411 U.S. 138, 142-143 (1973). The difficulty and inefficiency of this approach is reflected here, where the District Court spent a total of six days in evidentiary hearings creating "the record" on SUWA's preliminary injunction motion. See Pet. Ap. at 65a (explaining District Court received testimony "during a two-day hearing on Plaintiffs' motion for temporary restraining order and during a four-day preliminary injunction hearing. . . . "). Such an approach requires investment of substantial resources by the court and the participants, and presents the risk of awkward overlap between judicial and administrative functions in compiling and reviewing plaintiffs' formulation of a "record" of the selected inaction for the first time in the district court.

Of even greater concern is the potential that such procedures invite judicial intrusion into ongoing administrative processes. Supposedly a section 706(1) claim could

do no more than "compel" the agency to exercise its discretion on the ignored legal duty, but here SUWA invites the court to close areas to vehicle access in response to BLM's alleged "failure to act" on the nonimpairment mandate. This situation presents a clear risk that a single district court judge might "slid[e] unconsciously from the narrow confines of law into the more spacious domain of policy." *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941).

Finally, from the perspective of regulated parties and the public, the Tenth Circuit majority's rule leaves little incentive to participate fully, if at all, in the administrative process. Instead, interested parties might continually threaten and bring section 706(1) claims in the hope of gaining leverage or badgering the agency into management changes outside the administrative process. Those diligently attending public meetings and submitting comments to the agency's proposed decisions will likely see their input overshadowed by closed door negotiations between the agency and special interests brandishing broad section 706(1) claims. Under the new rule, the administrative process will at best be a symbolic exercise where interested parties participate to the minimum extent necessary to satisfy any jurisdictional prerequisites to further review, while focusing their efforts on the dialogue occurring outside the formal public process. Such a result warps fundamental principles of administrative law.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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GALE NORTON, SECRETARY
OF THE INTERIOR, ET AL., PETITIONERS

v.

SOUTHERN UTAH WILDERNESS ALLIANCE, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE PETITIONERS

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QUESTION PRESENTED

Whether the authority of the federal courts under the Administrative Procedure Act (APA), 5 U.S.C. 706(1), to "compel agency action unlawfully withheld or unreasonably delayed" extends to the review of the adequacy of an agency's ongoing management of public lands under general statutory standards and its own land use plans.

PARTIES TO THE PROCEEDINGS

The petitioners in this Court are Gale Norton, Secretary of the Interior; Kathleen Clarke, Director of the Bureau of Land Management, and the Bureau of Land Management. The respondents are:

Southern Utah Wilderness Alliance

The Wilderness Society

The Sierra Club

Great Old Broads for Wilderness

Wildlands CPR

Utah Council of Trout Unlimited

American Lands Alliance

The Friends of the Abajos

The State of Utah

San Juan County

Emery County

Utah School and Institutional Trust Lands Administration

Utah Shared Access Alliance

Blue Ribbon Coalition

Elite Motorcycle Tour

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TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statutory and regulatory provisions involved	2
Statement	2
Summary of argument	9
Argument:	
Section 706(1) does not provide authority for a court to review the adequacy of an agency's ongoing management of public lands under general statutory standards and its own land use plans	12
I. Section 706(1) authorizes a court only to direct an agency to complete discrete final agency action that has been "unlawfully withheld or unreasonably delayed"	12
A. The text of the APA makes clear that a court may "compel" under Section 706(1) only the sort of final agency action that a court may "set aside" under Section 706(2)	13
1. The APA confines judicial review to challenges to final agency action	13
2. Section 706(1) allows courts to compel only final agency action that, if taken, could be reviewed under Section 706(2)	16
B. Confining Section 706(1) to suits to compel discrete final agency action comports with the APA's purposes and the Constitution's separation of powers	18

Table of Contents—Continued: Page

1. The APA's judicial review chapter reflects Congress's purpose to circumscribe courts' intervention into agencies' affairs 18
2. Section 706(1), like the APA's other judicial review provisions, was not intended to allow courts to exercise nonjudicial functions 20
3. Confining Section 706(1) to suits to compel final agency action avoids improper intrusion by courts into agency activities 25

II. The court of appeals erred in holding that plaintiffs' challenges to BLM's management of off-road vehicle use on public lands are cognizable under Section 706(1) 30
A. Courts have no authority under Section 706(1) to review whether BLM is adequately managing public lands to maintain their suitability for preservation as wilderness 30
1. Plaintiffs' claim does not seek to compel final agency action 32
2. Plaintiffs' claim does not seek to enforce a mandatory, non-discretionary duty 33
B. Courts have no authority under Section 706(1) to order BLM to consider whether to undertake supplemental environmental analyses under NEPA 36

Table of Contents—Continued: Page

C. Courts have no authority under Section 706(1) to compel BLM to perform planning and management tasks identified in its land use plans 40
1. A BLM land use plan is not a source of mandatory, non-discretionary duties that may be enforced under Section 706(1) 41
2. The tasks identified in BLM's land use plans generally do not require the taking of final agency action that may be compelled under Section 706(1) 46

Conclusion 49
Appendix 1a

TABLE OF AUTHORITIES

Cases:

Auer v. *Robbins*, 519 U.S. 452 (1997) 28-29
Bennett v. *Spear*, 520 U.S. 154 (1997) 14, 17, 28, 38, 47
Bowen v. *Georgetown Univ. Hosp.*, 488 U.S. 204 (1988) 22
Brock v. *Pierce County*, 476 U.S. 253 (1986) 17, 26
Brown v. *Gardner*, 513 U.S. 115 (1994) 16
Chicago & S. Air Lines, Inc. v. *Waterman S.S. Corp.*, 333 U.S. 103 (1948) 15
Chrysler Corp. v. *Brown*, 441 U.S. 281 (1979) 22
Coker v. *Sullivan*, 902 F.2d 84 (D.C. Cir. 1990) 40
Costle v. *Pacific Legal Found.*, 445 U.S. 198 (1980) 17
Dalton v. *Specter*, 511 U.S. 462 (1994) 14
Decatur v. *Paulding*, 39 U.S. (14 Pet.) 497 (1840) 24, 25, 34, 44
Ecology Ctr., Inc. v. *United States Forest Serv.*, 192 F.3d 922 (9th Cir. 1999) 26

Cases—Continued: Page

FCC v. *Pottsville Broad. Co.*, 309 U.S. 134 (1940) 20, 21
FTC v. *Standard Oil Co.*, 449 U.S. 232 (1980) 15, 29, 38
Forest Guardians v. *Babbit*, 174 F.3d 1178 (10th Cir. 1999) 44
Franklin v. *Massachusetts*, 505 U.S. 788 (1992) 14-15
Gillis v. *United States Dep't of Health & Human Servs.*, 759 F.2d 565 (6th Cir. 1985) 26
Heckler v. *Chaney*, 470 U.S. 832 (1985) 29
Independence Mining Co. v. *Babbitt*, 105 F.3d 502 (9th Cir. 1997) 24
Independent Petroleum Ass'n of Am. v. *Babbitt*, 235 F.3d 588 (D.C. Cir. 2001) 16
ICC v. *New York, New Haven & Hartford R.R.*, 287 U.S. 178 (1932) 23, 24
ICC v. *United States ex rel. Humboldt S.S. Co.*, 224 U.S. 474 (1912) 26
Kendall v. *United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524 (1838) 23
Kleppe v. *Sierra Club*, 427 U.S. 390 (1976) 38
Louisiana v. *McAdoo*, 234 U.S. 627 (1914) 24
Lujan v. *National Wildlife Fed'n*, 497 U.S. 871 (1990) 15, 16, 17, 27, 32, 48
Marsh v. *Oregon Natural Res. Council*, 490 U.S. 360 (1989) 7, 37, 38
Montana Wilderness Ass'n v. *United States Forest Serv.*, 314 F.3d 1146 (9th Cir. 2003), petitions for cert. pending, Nos. 03-109 & 03-123 (filed July 22, 2003) 27-28, 29
Mt. Emmons Mining Co. v. *Babbitt*, 117 F.3d 1167 (10th Cir. 1997) 24
NRDC, Inc. v. *Hodel*, 624 F. Supp. 1045 (D. Nev. 1985), aff'd, 819 F.2d 927 (9th Cir. 1987) 44
NRDC, Inc. v. *SEC*, 606 F.2d 1031 (D.C. Cir. 1979) 18
Northcoast Envtl. Ctr. v. *Glickman*, 136 F.3d 600 (9th Cir. 1998) 38-39

Cases—Continued: Page

Ohio Forestry Ass'n v. *Sierra Club*, 523 U.S. 726 (1998) 43, 44
Potomac Elec. Power Co. v. *ICC*, 702 F.2d 1026 (D.C. Cir. 1983) 24
Public Citizen Health Research Group v. *Commissioner, Food & Drug Admin.*, 740 F.2d 21 (D.C. Cir. 1984) 17, 28
Public Citizen v. *Nuclear Regulatory Comm'n*, 845 F.2d 1105 (D.C. Cir. 1988) 26, 27
Robertson v. *Methow Valley Citizens Council*, 490 U.S. 332 (1989) 38
Rochester Tel. Corp. v. *United States*, 307 U.S. 125 (1939) 20
Safeway Stores, Inc. v. *Brown*, 138 F.2d 278 (Emer. Ct. App.), cert. denied, 320 U.S. 797 (1943) 24
Sierra Club v. *Peterson*, 228 F.3d 559 (5th Cir. 2000), cert. denied, 532 U.S. 1051 (2001) 16, 17-18, 26
Sierra Club v. *Thomas*, 828 F.2d 783 (D.C. Cir. 1987) 39
United States ex rel. Dunlap v. *Black*, 128 U.S. 40 (1888) 23, 26
Utah v. *Babbitt*, 137 F.3d 1193 (10th Cir. 1998) 4
Washington State Dep't of Soc. & Health Servs. v. *Guardianship Estate of Keffeler*, 537 U.S. 371 (2003) 14
Weinberger v. *Salfi*, 422 U.S. 749 (1975) 29
Work v. *United States ex rel. Rives*, 267 U.S. 175 (1925) 35

Constitution, statutes, regulations and rule:

U.S. Const. Art. III 27
Administrative Procedure Act, 5 U.S.C. 551 *et seq.*:
5 U.S.C. 551(4) 13, 2a
5 U.S.C. 551(6) 13, 2a
5 U.S.C. 551(8) 14, 2a

Statutes, regulations and rule—Continued: Page

5 U.S.C. 551(10) 14, 3a
5 U.S.C. 551(11) 14, 3a
5 U.S.C. 551(13) 13, 14, 33, 3a
5 U.S.C. 553(e) 28
5 U.S.C. 701(a)(1) 17, 19
5 U.S.C. 701(a)(2) 17, 19, 29, 4a
5 U.S.C. 701(b)(2) 13, 16, 5a
5 U.S.C. 702 ..... 13, 19, 5a
5 U.S.C. 704 ..... 11, 13, 17, 19, 38, 6a
5 U.S.C. 706 ..... 13, 29, 7a
5 U.S.C. 706(1) ..... *passim*
5 U.S.C. 706(2) ..... *passim*
All Writs Act, ch. 231, § 262, 36 Stat. 1162 (28 U.S.C. 1651(a)) 23
Emergency Price Control Act of 1942, ch. 26, 56 Stat. 23 24
Federal Land Policy and Management Act of 1976, 43 U.S.C. 1701 *et seq.* 2
43 U.S.C. 1701(a)(2) 41
43 U.S.C. 1711 4
43 U.S.C. 1712(a) 4, 41, 9a
43 U.S.C. 1712(c) 4, 9a
43 U.S.C. 1712(c)(1) 41, 10a
43 U.S.C. 1712(c)(3) 41
43 U.S.C. 1712(c)(7) 41, 10a
43 U.S.C. 1732(a) 4, 8, 45, 11a
43 U.S.C. 1732(b) 4
43 U.S.C. 1782 ..... 12a
43 U.S.C. 1782(a) 2-3, 4, 12a
43 U.S.C. 1782(c) 3, 7, 10, 30, 31, 32, 35, 13a
Montana Wilderness Study Act of 1997, Pub. L. No. 95-150, § 3(a), 91 Stat. 1244 28
National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.* 5
42 U.S.C. 4332(2)(C) 11, 30, 37, 38, 8a
16 U.S.C. 1131(c) 3

Statutes, regulations and rule—Continued: Page

16 U.S.C. 1133(b) 3
16 U.S.C. 1133(c) 3
40 C.F.R.:
Section 1500.1(b) 37
Section 1501.4(b) 37
Section 1502.9(c)(1)(i) 37
Section 1502.9(c)(1)(ii) 37
Section 1508.9(a)(1) 37
Section 1508.13 37
43 C.F.R.:
Section 1601.0-2 ..... 41, 14a
Section 1601.0-5(c) 8, 45, 14a
Section 1601.0-5(k) 4, 42, 14a
Section 1601.5-5 42
Section 1601.5-6 42
Section 1610.3-2 ..... 45, 15a
Section 1610.3-2(a) 46, 15a
Section 1610.5-3 ..... 16a
Section 1610.5-3(a) 4, 6, 45
Fed. R. Civ. P. 54(b) 7

Miscellaneous:

Administrative Procedure Act: Legislative History 79th Congress, 1944-1946 (photo. reprint Sept. 1, 1970) (1946) 20-21
BLM, *Resource Management Plan Record of Decision and Rangeland Program Summary for the San Juan Resource Area* (Mar. 1991) 42
BLM, U.S. Dep't of the Interior, *Interim Management Policy for Lands Under Wilderness Review* (visited Jan. 5, 2004) <http://www.ut.blm.gov/utahwilderness/imp/imp.htm> 3
Cedar City Dist. Office, BLM, *Cedar Beaver Garfield Antimony Resource Management Plan* (Oct. 1984) 43
44 Fed. Reg. 72,014 (1979) 3
45 Fed. Reg. 75,602 (1980) 3

Miscellaneous—Continued: Page

H.R. Rep. No. 1163, 94th Cong., 2d Sess. (1976) 41
Carol R. Miaskoff, *Judicial Review of Agency Delay and Inaction Under Section 706(1) of the Administrative Procedure Act*, 55 Geo. Wash. L. Rev. 635 (1987) 27
St. George Field Office, BLM, *Record of Decision and Resource Management Plan* (Mar. 1999) 42
Salt Lake Dist., BLM, *Record of Decision and Rangeland Program Summary for the Box Elder Resource Management Plan* (1986) 43
San Rafael Route Designation Plan (visited Jan. 2, 2004) <http://www.ut.blm.gov/sanrafaelohv/index.htm> 47
Senate Comm. on the Judiciary, 79th Cong., 1st Sess., *Administrative Procedure Act* (Comm. Print 1945) 20
S. Doc. No. 8, 77th Cong., 1st Sess. (1941) 18, 19, 20, 22
S. Rep. No. 752, 79th Cong., 1st Sess. (1945) 18, 19, 21, 26
United States Dep't of Justice, *Attorney General's Manual on the Administrative Procedure Act* (1947) 22, 23, 24, 25, 33
Vernal Dist. Office, BLM, *Diamond Mountain Resource Area Resource Management Plan and Record of Decision* (Fall 1994) 43
Vernal Dist. Office, BLM, *Record of Decision and Rangeland Program Summary for the Book Cliffs Resource Management Plan* (May 1985) 43

In the Supreme Court of the United States

No. 03-101

GALE NORTON, SECRETARY OF THE INTERIOR, ET AL., PETITIONERS

v.

SOUTHERN UTAH WILDERNESS ALLIANCE, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE PETITIONERS

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-54a) is reported at 301 F.3d 1217. The opinion of the district court (Pet. App. 55a-76a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 29, 2002. A petition for rehearing was denied on February 18, 2003 (Pet. App. 77a). On May 12, 2003, Justice Breyer extended the time within which to file a petition for a writ of certiorari to and including June 18, 2003, and, on June 6, 2003, Justice Breyer extended that time to and including July 18, 2003. The petition for writ of certiorari was filed on July 18, 2003, and was granted on November 3, 2003. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant provisions of Titles 5, 42, and 43 of the United States Code and Title 43 of the Code of Federal Regulations are reproduced in the Appendix to this brief.

STATEMENT

This case concerns the scope of a federal court's authority under the Administrative Procedure Act (APA) to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. 706(1). A divided panel of the Tenth Circuit held that a plaintiff may invoke Section 706(1) to challenge the adequacy of an agency's day-to-day administration of a government program—here, an agency's management of certain public lands. The panel held that Section 706(1) is not confined to suits to compel final agency action of the sort that, once taken by the agency, would be reviewable under Section 706(2) of the APA. The panel went on to hold that Section 706(1) may be used to enforce generally stated statutory standards, which leave an agency with considerable discretion regarding their definition and implementation, and to order an agency to achieve goals and objectives set out in its own planning documents, even in the absence of any proposed site-specific action.

1. The Bureau of Land Management (BLM) administers approximately 23 million acres of federal lands in the State of Utah. This case challenges aspects of BLM's management of those lands with respect to off-road vehicle usage.

Within the federal lands administered by BLM in Utah are a number of "wilderness study areas," or WSAs. The Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. 1701 *et seq.*, directs the Secretary of the Interior to review, and to recommend to the President, whether certain roadless areas of federal lands are suitable for designation by Congress as wilderness. 43 U.S.C.

1782(a); see 16 U.S.C. 1131(c) (defining wilderness). FLPMA further provides that, "[d]uring the period of review of such areas and until Congress has determined otherwise," the areas are to be managed "in a manner so as not to impair [their] suitability * * * for preservation as wilderness." 43 U.S.C. 1782(c).[1]

In 1979, to implement FLPMA's "non-impairment of suitability" standard, BLM issued its Interim Management Policy and Guidelines for Lands Under Wilderness Review, 44 Fed. Reg. 72,014, which has periodically been revised. See BLM, U.S. Dep't of the Interior, *Interim Management Policy for Lands Under Wilderness Review* (visited Jan. 5, 2004) <http:www.ut.blm.gov/utahwilderness/imp/imp.htm>. The Interim Management Policy interprets that standard to require BLM to manage each wilderness study area to prevent it from being "degraded so far, compared with the area's values for other purposes, as to significantly constrain the Congress's prerogative to either designate [it] as wilderness or release it for other uses." *Id.* Intro. The Interim Management Policy makes clear, however, that "[m]anagement to the nonimpairment standard does not mean that the lands will be managed as though they had already been designated as wilderness." *Ibid.* Among other things, the Interim Management Policy restricts motor vehicle use within wilderness study areas to existing "ways" (*i.e.*, unimproved traces maintained only by the passage of vehicles) and designated "open" areas. *Id.* Ch. 1, at B-11.

In 1980, BLM designated 2.5 million acres of public lands in Utah as wilderness study areas. 45 Fed. Reg. 75,602. In 1990, the Secretary recommended to the President, who subsequently recommended to Congress, that 1.9 million of

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[1] A wilderness area, once designated by Congress, is to be managed to "preserve[] [its] wilderness character." 16 U.S.C. 1133(b); see, *e.g.*, 16 U.S.C. 1133(c) (prohibiting motor vehicles, with certain exceptions, in wilderness areas).

those acres be designated as wilderness. See *Utah* v. *Babbitt*, 137 F.3d 1193, 1199 (10th Cir. 1998). Congress has not acted on that recommendation.[2]

BLM manages other federal lands in Utah (*e.g.*, areas that are not wilderness areas or wilderness study areas) in accordance with provisions of FLPMA that are generally applicable to all federal lands. See, *e.g.*, 43 U.S.C. 1732(b) ("In managing the public lands the Secretary shall * * * take any action necessary to prevent unnecessary or undue degradation of the lands."). FLPMA requires BLM to develop land use plans for units of public lands under its administration, see 43 U.S.C. 1712(a) and (c); to "manage the public lands * * * in accordance with the land use plans," 43 U.S.C. 1732(a); and to revise the land use plans "when appropriate," 43 U.S.C. 1712(a). BLM's regulations provide that "[a]ll future resource management authorizations and actions * * * and subsequent more detailed or specific planning, shall conform to the approved plan." 43 C.F.R. 1610.5-3(a).[3]

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[2] On April 11, 2003, the Secretary of the Interior and the State of Utah agreed to settle a lawsuit that, among other things, involved the possible designation of additional wilderness study areas in Utah. See Stipulation and Joint Motion to Enter Order Approving Settlement and to Dismiss the Third Amended and Supplemented Complaint, *Utah* v. *Norton*, No. 96-CV-870 (D. Utah); see *Utah*, 137 F.3d at 1199-1200. Under the terms of that settlement, the Secretary acknowledged that her authority to designate wilderness study areas under 43 U.S.C. 1782(a) expired in 1993. BLM will continue, however, to exercise its authority under 43 U.S.C. 1711, to inventory resources for certain values, including wilderness values. The settlement does not apply to any previously designated wilderness study areas or otherwise affect any of the claims before the Court in this case. SUWA, as intervenor in that case, has appealed the entry of the settlement, and the Secretary and Utah have moved to dismiss the appeal.

[3] FLPMA refers to "land use plans," while BLM's regulations refer to "resource management plans," defining that term as "a land use plan as described by [FLPMA]." 43 C.F.R. 1601.0-5(k). The term "land use plan" is used in this brief to refer to the resource management plans developed by BLM pursuant to FLPMA.

2. In 1999, Southern Utah Wilderness Alliance and other organizations (collectively SUWA), which are among the respondents here, filed suit under 5 U.S.C. 706(1) against the Secretary of the Interior, the Director of BLM, and BLM. As relevant here, SUWA claimed that BLM had "failed to perform its statutory and regulatory duties" to protect public lands in Utah from damage allegedly caused by off-road vehicle use. Pet. App. 3a. SUWA also claimed that BLM had failed to implement provisions of its land use plans relating to management of off-road vehicles. *Ibid.* SUWA further claimed that BLM had failed to take a "hard look" at whether, pursuant to the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, supplemental environmental analyses should be undertaken for areas in which off-road vehicle use had increased. Pet. App. 3a; see Br. in Opp. App. 1-26 (reproducing second amended complaint).

SUWA thereafter filed a motion for a preliminary injunction. The motion sought to compel BLM to prohibit off-road vehicle use in four wilderness study areas and five additional areas. Groups representing the interests of off-road vehicle users and an individual user intervened to oppose the suit. Pet. App. 3a-4a; see SUWA C.A. App. 44-92 (Mem. in Supp. of Mot. for Prelim. Inj.).

After an evidentiary hearing, the district court denied SUWA's motion for a preliminary injunction and granted the intervenors' motion to dismiss four of the complaint's causes of action as not cognizable under 5 U.S.C. 706(1). Pet. App. 55a-76a.[4] The court characterized Section 706(1) as "a very

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[4] The district court dismissed the first, fifth, sixth, and seventh causes of action in the second amended complaint with prejudice and the ninth cause of action without prejudice. Pet. App. 75a-76a. SUWA did not appeal the dismissal of the first count. SUWA C.A. Br. 6 n.4. After the filing of the certiorari petitions, SUWA filed a third amended complaint. The third, fourth, and fifth causes of action in the third amended complaint correspond to the fifth, sixth, and seventh causes of action in the second amended complaint. Compare Br. in Opp. App. 20-22 with *id.* at 42-45.

narrow exception to the APA's limitation of judicial review of final agency action," which "has been narrowly construed to prevent judicial intrusion into the day-to-day workings of agencies" and has been understood to provide relief that "is essentially the equivalent of mandamus." *Id.* at 59a. The court consequently reasoned that Section 706(1) affords a remedy only when an agency is subject to a "clear nondiscretionary duty" and "only where there is a genuine failure to act." *Id.* at 59a-60a.

The district court held that SUWA's claim that BLM had failed to prevent impairment of the suitability of the wilderness study areas for wilderness designation was "a complaint about the sufficiency of BLM's action, rather than a genuine failure to act" cognizable under Section 706(1). Pet. App. 65a; see *id.* at 62a-66a. The court observed that BLM had presented "significant evidence about the steps it is and has been taking to prevent * * * impairment" of those areas, and that even SUWA had acknowledged that BLM was taking some action in that regard. *Id.* at 65a-66a.

Similarly, the district court held that Section 706(1) did not provide a basis for SUWA to challenge BLM's alleged failure to complete monitoring and planning activities identified in its land use plans. Pet. App. 67a-68a. The court explained that SUWA's claims were again about the "sufficiency of BLM's actions," and that "there has not been a complete failure to perform a legally required duty that would trigger a review under § 706(1)." *Ibid.* The court also concluded that, because the relevant regulation requires BLM to adhere to its land use plans only when undertaking "future resource management authorizations and actions * * * and subsequent more detailed or specific planning," 43 C.F.R. 1610.5-3(a), BLM's alleged noncompliance with a land use plan may be challenged only in connection with "some site-specific action * * * that does not conform to the plan." Pet. App. 67a.

The district court further held that BLM was not required under NEPA to take a "hard look" at whether increased off-road vehicle use required the preparation of supplemental environmental analyses. Pet. App. 74a. The court reasoned that BLM did not have "a clear duty to act under NEPA" to consider the need to supplement its earlier environmental analyses. *Ibid.* "Indeed," the court added, "the decision whether to prepare a supplemental environmental impact statement is the kind of factual question that implicates agency technical expertise and requires courts to 'defer to the informed discretion of the responsible federal agencies.'" *Ibid.* (quoting *Marsh* v. *Oregon Natural Res. Council*, 490 U.S. 360, 377 (1989)).

The district court certified its dismissal of SUWA's claims as a final judgment under Rule 54(b) of the Federal Rules of Civil Procedure. See Pet. App. 4a & n.1.

3. A divided panel of the Tenth Circuit reversed and remanded the case for consideration of the merits of SUWA's claims. Pet. App. 1a-54a.

a. The court of appeals held that SUWA could assert a challenge under Section 706(1) to BLM's alleged failure to comply with its duty under FLPMA to manage the wilderness study areas at issue "so as not to impair the suitability of such areas for preservation as wilderness." Pet. App. 14a (citing 43 U.S.C. 1782(c)). The court concluded that the "agency action" that may be compelled under Section 706(1) includes not only "final, legally binding actions," but also "day-to-day management actions" such as BLM's ongoing management of the wilderness study areas. *Id.* at 15a-16a. While acknowledging that agency action may be compelled under Section 706(1) "only where the agency fails to carry out a mandatory, nondiscretionary duty," *id.* at 10a, the court concluded that FLPMA's general requirement that BLM manage the wilderness study areas to prevent impairment of their suitability for wilderness designation is

mandatory and non-discretionary, and thus may be enforced in a suit under Section 706(1). *Id.* at 13a. The court further held that relief may be warranted under Section 706(1) notwithstanding that BLM has "taken some action * * * to address impairment" of the wilderness study areas. *Id.* at 19a.

The court of appeals also held that Section 706(1) permits a challenge to BLM's alleged failure to accomplish certain management goals and activities identified in its land use plans. Pet. App. 24a-32a. The court reasoned that a mandatory, non-discretionary duty to complete those tasks arises from FLPMA's provision that public lands "shall [be] manage[d] * * * in accordance with the land use plans," 43 U.S.C. 1732(a); from regulations that the court understood to require BLM to "adhere to the terms, conditions, and decisions" of such plans, 43 C.F.R. 1601.0-5(c); and from language in the relevant land use plans stating that off-road vehicle use "will be monitored" in one area and that an off-road vehicle implementation plan "will be developed" for another area. Pet. App. 26a. While acknowledging that Congress intended BLM's land use plans "to be dynamic documents, capable of adjusting to new circumstances and situations," *id.* at 27a, the court concluded that BLM "can be held accountable for failing to act as required by the mandatory duties outlined in" such plans. *Id.* at 28a. The court also concluded that BLM could be compelled under Section 706(1) to comply with provisions of a land use plan even in circumstances, such as those here, in which BLM is not undertaking any "site-specific project." *Id.* at 28a-29a.

Finally, the court of appeals held that BLM could be compelled under Section 706(1) to take a "hard look" at whether increased off-road vehicle use in certain areas warranted the preparation of supplemental environmental analyses under NEPA. Pet. App. 32a-39a. The court found it irrelevant to the availability of relief under Section 706(1) that BLM intended to perform additional NEPA analyses in the near

future in connection with its revision of existing land use plans, and that compelling BLM to undertake the NEPA analyses sought by SUWA would divert BLM's resources from other current and planned NEPA activities. *Id.* at 37a-38a. Instead, the court concluded that claims of inadequate resources would have to be raised as a defense in any contempt proceeding that might arise if BLM failed to carry out a duty after being ordered by the district court to do so. *Id.* at 38a.

b. Senior Judge McKay dissented in part. Pet. App. 39a-54a. First, he reasoned that Section 706(1) does not provide a vehicle for "claims challenging an agency's overall method of administration or for controlling the agency's day-to-day activities." *Id.* at 43a. He viewed the majority's decision as "essentially transform[ing] § 706(1) into an improper and powerful jurisdictional vehicle to make programmatic attacks on day-to-day agency operations." *Id.* at 46a. Second, he reasoned that Section 706(1) authorizes challenges only to "true agency inaction," not agency efforts that merely "fall[] short of completely achieving the agency's obligations." *Ibid.* Finally, he stated that Section 706(1) does not permit plaintiffs to challenge "an agency's failure to meet each and every goal set out in its land use plans," *id.* at 51a, observing that such challenges "would allow plaintiffs of all varieties to substantially impede an agency's day-to-day operations," *id.* at 50a.[5]

SUMMARY OF ARGUMENT

I. The APA confines judicial review to those instances in which an agency has taken, or has a clear, mandatory duty to take, a discrete "agency action," such as the issuance of a rule or an order. And, unless Congress has provided otherwise, judicial review is further confined to agency

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[5] Judge McKay did not dissent from the court of appeals' holding on the NEPA issue. Pet. App. 39a.

action that is "final," *i.e.*, that both concludes the agency's decisionmaking process and determines rights or obligations. Those constraints, which the APA drew from settled principles of judicial review previously articulated by this Court, preserve agencies' and courts' separate spheres of authority and thereby reinforce the constitutional separation of powers.

Consistent with that legal framework, Section 706(1), which authorizes courts to "compel agency action unlawfully withheld or unreasonably delayed," may be invoked only when an agency has failed to complete a distinct final action —the same sort of action that may be reviewed under the more commonly invoked Section 706(2), which authorizes courts to "set aside agency action" found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Moreover, consistent with the understanding that Section 706(1) was designed to codify existing mandamus practice, Section 706(1) does not permit a court to interfere with an agency's exercise of its judgment or discretion: Under Section 706(1), although a court may direct an agency *to act* when action is clearly required by law, a court may not direct an agency *how to act*. Accordingly, Section 706(1) is not a suitable vehicle for judicial scrutiny of an agency's day-to-day administration of a program—such as its management of public lands—pursuant to general statutory standards that vest the agency with wide discretion regarding their interpretation and implementation.

II. None of the three categories of claims at issue in this case is cognizable under Section 706(1), as properly construed to permit a court only to compel discrete final agency action, and not to intrude into the exercise of agency discretion.

A. FLPMA's requirement that BLM manage wilderness study areas "in a manner so as not to impair the suitability of such areas for preservation as wilderness," 43 U.S.C. 1782(c),

is not judicially enforceable under Section 706(1). That provision of FLPMA does not require BLM to take any particular final agency action in its administration of wilderness study areas. The court of appeals erred in concluding that Section 706(1) permits the district court to engage in a necessarily wide-ranging inquiry into the adequacy of BLM's compliance with that standard in its day-to-day management of the wilderness study areas in Utah. Such an inquiry would invite the district court improperly to substitute its judgment and discretion for those of the agency, to order the taking of measures that are different from or in addition to those taken by the agency, and to exceed its proper role under Article III of the Constitution.

B. BLM's compliance with NEPA's requirement that agencies analyze the environmental consequences of proposed "major Federal actions," 42 U.S.C. 4332(2)(C), is likewise not judicially enforceable under Section 706(1). An agency's environmental impact statement under NEPA—whether initial or supplemental—is not itself final agency action within the meaning of the APA. It is instead the sort of "preliminary, procedural, or intermediate agency action" that is "not directly reviewable" under the APA, although it is reviewable under Section 706(2) in connection with subsequent final agency action for which the environmental analysis was required by NEPA. 5 U.S.C. 704. Here, moreover, because BLM has not decided whether to propose any "major Federal action" in the areas at issue, NEPA does not impose any duty on BLM to supplement an existing environmental analysis.

C. The goals and objectives that BLM sets out for itself in its land use plans are not judicially enforceable under Section 706(1). Many such objectives, such as the off-road vehicle monitoring that SUWA sought to compel here, do not require the taking of any final agency action. More fundamentally, a land use plan is not a source of mandatory, non-

discretionary duties that are owed to particular members of the public and that may be compelled in a suit under Section 706(1). A land use plan is instead a fluid, process-oriented document produced by BLM itself to guide its ongoing management and planning and its future site-specific activities with respect to a large area of public land. BLM's ability to accomplish the objectives that it sets for itself, and to do so within any time frames that it sets for itself, is necessarily contingent on available resources and competing priorities. Section 706(1) does not authorize courts to reorder BLM's agenda for the allocation of limited resources among various management and planning objectives.

ARGUMENT

SECTION 706(1) DOES NOT PROVIDE AUTHORITY FOR A COURT TO REVIEW THE ADEQUACY OF AN AGENCY'S ONGOING MANAGEMENT OF PUBLIC LANDS UNDER GENERAL STATUTORY STANDARDS AND ITS OWN LAND USE PLANS

I. Section 706(1) Authorizes A Court Only To Direct An Agency To Complete Discrete Final Agency Action That Has Been "Unlawfully Withheld Or Unreasonably Delayed"

The APA does not authorize the federal courts to entertain challenges to anything and everything that an agency may do, or fail to do, in the conduct of its business. The APA instead confines judicial intervention to those instances in which the agency has taken, or has a duty to take, a discrete final agency action. That conclusion is compelled by the APA's text, history, and purposes. It applies equally whether an APA suit seeks to "compel agency action" under Section 706(1) or to "set aside agency action" under Section 706(2).

A. The text of the APA makes clear that a court may "compel" under Section 706(1) only the sort of final agency action that a court may "set aside" under Section 706(2)

1. The APA confines judicial review to challenges to final agency action

Section 702 of the APA provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. 702. Section 706, the APA provision principally at issue in this case, defines the scope of such review. As relevant here, Section 706 states that "[t]he reviewing court shall—(1) compel agency action unlawfully withheld or unreasonably delayed; and (2) hold unlawful and set aside agency action, findings, and conclusions found to be," *inter alia*, "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706.

Judicial review under the APA is thus limited to "agency action," which the APA defines as "includ[ing] the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. 551(13); see 5 U.S.C. 701(b)(2). All of the specific examples of "agency action" given in Section 551(13) are discrete products of a focused decisionmaking process by the agency—such as the promulgation of a rule,[6] the issuance of an order,[7]

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[6] See 5 U.S.C. 551(4) (defining "rule" as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency").

[7] See 5 U.S.C. 551(6) (defining "order" as "the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making").

the grant or denial of a license,[8] the imposition of a sanction or the refusal to impose one,[9] or the allowance or withholding of relief.[10] The term "the equivalent or denial thereof" is properly understood to refer to similarly discrete actions, in accordance with the canon that general terms are known by their more specific companions. See, *e.g.*, *Washington State Dep't of Soc. & Health Servs.* v. *Guardianship Estate of Keffeler*, 537 U.S. 371, 384-385 (2003). Likewise, the term "failure to act" is properly understood to refer to a failure to promulgate a rule, issue an order, or take other discrete action of the sort identified in Section 551(13).

Judicial review under the APA is further limited, absent a specific statute providing otherwise, to "*final* agency action for which there is no other adequate remedy in a court." 5 U.S.C. 704 (emphasis added). This Court has explained that agency action, in order to be "final" and reviewable under the APA, both "must mark the consummation of the agency's decisionmaking process" and "must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett* v. *Spear*, 520 U.S. 154, 177-178 (1997) (internal quotation marks omitted); accord *Dalton* v. *Specter*, 511 U.S. 462, 469-471 (1994); *Franklin* v. *Massachusetts*, 505 U.S. 788, 797-798 (1992); *FTC* v. *Standard Oil Co.*, 449 U.S. 232, 239-243 (1980); *Chicago & S. Air Lines, Inc.* v. *Waterman S.S. Corp.*, 333 U.S. 103, 112-113 (1948) ("[A]dministrative orders are not reviewable unless and until they impose an obligation, deny a right or fix some legal relationship as a consummation of the administrative process.").

[8] See 5 U.S.C. 551(8) (defining "license" as including "the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission").

[9] See 5 U.S.C. 551(10) (defining "sanction" as including "the whole or a part of an agency * * * prohibition, requirement, limitation, or other condition affecting the freedom of a person"; "withholding of relief"; "imposition of penalty or fine"; "destruction, taking, seizure, or withholding of property"; "assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees"; "requirement, revocation, or suspension of a license"; or "other compulsory or restrictive action").

[10] See 5 U.S.C. 551(11) (defining "relief" as including "the whole or a part of an agency * * * grant of money, assistance, license, authority, exemption, exception, privilege, or remedy"; "recognition of a claim, right, immunity, privilege, exemption, or exception"; or "other action on the application or petition of, and beneficial to, a person").

Such reviewable "final agency action" is readily distinguishable from an agency's day-to-day administration of its programs. This Court recognized as much in *Lujan* v. *National Wildlife Federation*, 497 U.S. 871 (1990). That case presented a challenge under Section 706(2) of the APA to "the continuing (and thus constantly changing) operations of the BLM" in, *inter alia*, classifying public land, developing and revising land use plans, and acting on requests to restore land to the public domain. 497 U.S. at 890; see *id.* at 877-879. The Court held that those activities could not be challenged "*wholesale*" under Section 706(2), because they did not constitute "an identifiable 'agency action'—much less a 'final agency action'"—within the meaning of the APA. *Id.* at 890, 891. "Under the terms of the APA," the Court explained, a plaintiff "must direct its attack against some particular 'agency action' that causes it harm," *id.* at 891, and "cannot demand a general judicial review of [an agency's] day-to-day operations," *id.* at 899.

As the Court acknowledged in *National Wildlife Federation*, such a "case-by-case approach"—which "is the traditional, and remains the normal, mode of operation of the courts"—may be an inefficient means of seeking "systemic improvement" in agency operations. 497 U.S. at 894. But the Court explained that "more sweeping actions are for the other branches." *Ibid.* Hence, the Court observed that the APA does not permit a party to "seek *wholesale* improvement of [an agency's] program by court decree, rather than in the offices of the Department or the halls of Congress,

where programmatic improvements are normally made." *Id.* at 891.[11]

2. Section 706(1) allows courts to compel only final agency action that, if taken, could be reviewed under Section 706(2)

An agency's "day-to-day operations" no more constitute reviewable "agency action" that may be "compel[led]" under Section 706(1) than they constitute reviewable "agency action" that may be "set aside" under Section 706(2). Section 706(1) authorizes courts to compel only discrete final action that the agency has unlawfully withheld or unreasonably delayed.

Congress intended the term "agency action" to have the same meaning in Section 706(1) as it has in Section 706(2). Congress provided that "[f]or the purpose of this chapter"—*i.e.*, the judicial review provisions of the APA, including both Section 706(1) and Section 706(2)—"'agency action' ha[s] the meaning[] given [it] by section 551 of this title." 5 U.S.C. 701(b)(2); see pp. 13-14, *supra* (discussing Section 551). And even aside from Section 701(b)(2), a term is presumed "to mean the same thing throughout a statute," especially "when a term is repeated within a given sentence." *Brown* v. *Gardner*, 513 U.S. 115, 118 (1994). Judicial review is thus

[11] Accord, *e.g.*, *Independent Petroleum Ass'n of Am.* v. *Babbitt*, 235 F.3d 588, 595 (D.C. Cir. 2001) (holding that challenge to Department of Interior's "efforts to collect" certain royalties was not cognizable under Section 706(2), because, "[l]ike the 'program' in [*National Wildlife Federation*], the 'efforts' that [plaintiff] seeks to challenge do not refer to any particular action taken by [the Department], much less to any particular order, regulation, or completed universe of orders or regulations"); *Sierra Club* v. *Peterson*, 228 F.3d 559, 565-566 (5th Cir. 2000) (en banc) (holding that challenge to Forest Service's timber harvesting "program" for Texas forests was not cognizable under Section 706(2), because plaintiff was advancing a "programmatic challenge[]," not a challenge to "a specific and final agency action"), cert. denied, 532 U.S. 1051 (2001).

confined under Section 706(1), as under Section 706(2), to discrete "agency action."

Section 704's requirement of "final agency action" likewise applies to suits under Section 706(1) as well as to those under Section 706(2). Section 704 provides that finality is a condition of "judicial review" under the APA, without distinguishing between review under Section 706(1) of an agency's failures to act and review under Section 706(2) of an agency's affirmative acts. Section 706(1) thus authorizes a court to compel only final agency action, *i.e.*, an action that culminates the agency's decisionmaking process and "by which rights or obligations have been determined, or from which legal consequences will flow," *Bennett*, 520 U.S. at 177-178—the sort of action that, if taken by the agency rather than withheld or delayed, would be reviewable under Section 706(2).

Consequently, unless review is otherwise barred by Section 701(a)(1) or (2), Section 706(1) permits a court to order an agency to respond to a rulemaking petition within a reasonable time (see, *e.g.*, *Public Citizen Health Research Group* v. *Commissioner, Food & Drug Admin.*, 740 F.2d 21, 34-35 (D.C. Cir. 1984)), or to make a "final determination" on an administrative complaint (see, *e.g.*, *Brock* v. *Pierce County*, 476 U.S. 253, 259, 260 n.7 (1986)), or to act on a permit application (see, *e.g.*, *Costle* v. *Pacific Legal Found.*, 445 U.S. 198, 220 n.14 (1980)). A court may not, however, order an agency to conduct its "day-to-day operations," *National Wildlife Federation*, 497 U.S. at 899, such as its ongoing management of public lands, differently from how they are being conducted. See, *e.g.*, *Sierra Club* v. *Peterson*, 228 F.3d 559, 563, 568 (5th Cir. 2000) (en banc) (holding that challenge to Forest Service's "entire program of allowing timber harvesting in the Texas forests" was not cognizable under Section 706(1) on "the * * * theory that the Forest

Service 'failed to act'" to protect natural resources), cert. denied, 532 U.S. 1051 (2001).

B. Confining Section 706(1) to suits to compel discrete final agency action comports with the APA's purposes and the Constitution's separation of powers

The judicial review chapter of the APA, including Section 706(1), was not intended to give courts expansive new authority to intervene in agency affairs. It was instead designed to codify the existing law of judicial review, which had been developed by this Court and other courts to preserve the separate spheres of authority of the Executive and Judicial Branches. Under that existing law, although a court could order a government official to take a specific action that was unequivocally commanded by an Act of Congress, a court could not direct the official's exercise of judgment and discretion in the conduct of his ongoing responsibilities.

1. The APA's judicial review chapter reflects Congress's purpose to circumscribe courts' intervention into agencies' affairs

Congress sought in the judicial review chapter of the APA to strike an appropriate balance "between the goal of efficient and effective agency action, on the one hand, and the value of judicial review in ensuring the rationality and fairness of agency decisionmaking, on the other." *NRDC, Inc.* v. *SEC*, 606 F.2d 1031, 1048 (D.C. Cir. 1979). The Attorney General's Committee on Administrative Procedure, whose work informed the drafting of the APA, advised Congress that the object of judicial review is "to *check*—not to *supplant*—administrative action." S. Doc. No. 8, 77th Cong., 1st Sess. 77 (1941); see S. Rep. No. 752, 79th Cong., 1st Sess. 4 (1945) (describing Committee's contribution). The Committee explained that "[r]eview must not be so extensive as to destroy the values—expertness, specialization, and the like—which * * * were sought in the establishment

of administrative agencies." S. Doc. No. 8, *supra*, at 77. The Committee added that the Constitution—in particular, its requirement that federal "'judicial power' may be exercised only in 'cases' and 'controversies'"—also operates to constrain courts from assuming legislative or administrative powers. *Id.* at 79.

The judicial review chapter of the APA was thus designed, consistent with the advice of the Attorney General's Committee, not only to confirm but also to cabin the courts' oversight of the activities of federal agencies. That design is evident in the provisions that withhold judicial review entirely when "statutes preclude judicial review" or "agency action is committed to agency discretion by law" (5 U.S.C. 701(a)(1) and (2)); that permit only persons who are "adversely affected or aggrieved by agency action" or "suffering legal wrong because of agency action" to seek review (5 U.S.C. 702); that mandate a deferential standard of review (5 U.S.C. 706(2)); and that generally limit judicial review to "final agency action" (5 U.S.C. 704). Those provisions were derived from "the existing law concerning the scope of judicial review," S. Rep. No. 752, *supra*, at 44 (App. B), which had served to prevent courts from intruding excessively or prematurely into agency functions. See S. Doc. No. 8, *supra*, at 83-92 (describing existing law of judicial review).

Congress was well aware of the function served by the final agency action requirement, in particular, in protecting agencies against undue intrusion by courts. The Attorney General's Committee informed Congress that "[t]he requirement of finality of administrative action and exhaustion of administrative remedies as a prerequisite of judicial review" was already well established by court decisions and agency-specific statutes. S. Doc. No. 8, *supra*, at 85. The Committee observed that the final agency action requirement not only served the same purposes as the final judgment rule within a system of superior and inferior courts, but also served other

important purposes, given "the added factor that court and agency are not parts of the same hierarchy." *Ibid.*; see *FCC* v. *Pottsville Broad. Co.*, 309 U.S. 134, 141-144 (1940) (discussed at p. 21, *infra*). The Committee explained that "[m]aintenance of amicable relations between them and avoidance of disrupting conflict requires generally that the administrative agency be permitted to finish its job before the court steps in." S. Doc. No. 8, *supra*, at 85; see *Rochester Tel. Corp.* v. *United States*, 307 U.S. 125, 130 (1939) (explaining that the Court's consistent refusal to review agency action that "does not of itself adversely affect complainant, but only affects his rights adversely on the contingency of future administrative action," was grounded in "traditional conceptions of federal judicial power," under which "resort to the courts in these situations is either premature or wholly beyond their province").

2. Section 706(1), like the APA's other judicial review provisions, was not intended to allow courts to exercise nonjudicial functions

Section 706(1) does not manifest any departure from the general approach of the APA's judicial review chapter. To the contrary, Section 706(1) can only properly be understood, consistent with its roots in mandamus (see pp. 22-25, *infra*), as a narrow remedy to compel a discrete final action that an agency is required by law to take or complete.

a. Congress was assured during its consideration of the APA that the courts' role under Section 706(1) was to be a very limited one. The Senate Judiciary Committee, for example, explained that, under Section 706(1), "[t]he court may require agencies to act, but may not under this provision tell them how to act in matters of administrative discretion." Senate Comm. on the Judiciary, 79th Cong., 1st Sess., *Administrative Procedure Act* (Comm. Print 1945), *reprinted in Administrative Procedure Act: Legislative History 79th Congress, 1944-1946*, at 40 (photo. reprint Sept. 1, 1970) (1946).

The Attorney General similarly emphasized, in an analysis that was appended to the Senate Report on the APA, that Section 706(1) was "not intended to confer any nonjudicial functions or to narrow the principle of continuous administrative control enunciated by the Supreme Court in *Federal Communications Commission* v. *Pottsville Broadcasting Co.*" S. Rep. No. 752, *supra*, at 44. In *Pottsville Broadcasting*, after holding that the FCC had committed a legal error in disqualifying an applicant for a license, the court of appeals issued a writ of mandamus to prevent the FCC from allowing new applicants to compete for the license. This Court directed that the writ be dissolved, explaining that the court of appeals could not "write the principle of priority into the statute as an indirect result of its power to scrutinize legal errors," and thereby prevent the FCC on remand from "enforcing the legislative policy committed to its charge." 309 U.S. at 145. "Unless the[] vital differentiations between the functions of judicial and administrative tribunals are observed," the Court explained, "courts will stray outside their province and read the laws of Congress through the distorting lenses of inapplicable legal doctrine." *Id.* at 144.

Congress enacted Section 706(1), moreover, with the guidance of the Attorney General's Committee, which advised that courts generally cannot, and should not, order agencies to perform their duties in a manner that the courts might believe to be more effective:

> [J]udicial review is rarely available, theoretically or practically, to compel effective enforcement of the law by the administrators. It is adapted chiefly to curbing excess of power, not toward compelling its exercise. Constitutional limitations may in some cases forbid the use of judicial power to correct underenforcement. But constitutional difficulties aside, the courts cannot, as a practical

> matter, be effectively used for that purpose without being assimilated into the administrative structure and losing their independent organization.

S. Doc. No. 8, *supra*, at 76. The Committee explained that the goal of assuring that agencies carry out the duties assigned to them by Congress must instead depend largely "on controls other than judicial review—internal controls in the agency, responsibility to the legislature or the executive, careful selection of personnel, pressure from interested parties, and professional or lay criticism of the agency's work." *Ibid.* Congress was surely mindful of that advice in its subsequent drafting of Section 706(1).

b. The Attorney General reiterated the narrow scope of Section 706(1) in a comprehensive exposition of the APA prepared shortly after its enactment. See United States Dep't of Justice, *Attorney General's Manual on the Administrative Procedure Act* 108 (1947) (*Attorney General's Manual*). This Court has traditionally given weight to the *Attorney General's Manual* in interpreting the APA, "since the Justice Department was heavily involved in the legislative process that resulted in the Act's enactment in 1946." *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 302 n.31 (1979); see *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 218 (1988) (Scalia, J., concurring) (noting that this Court has "repeatedly given great weight" to the *Attorney General's Manual* in its interpretation of the APA).

In describing Section 706(1) (Clause (A) of Section 10(e) of the APA as enacted in 1946), the *Attorney General's Manual* states:

> Clause (A) authorizing a reviewing court to "compel agency action unlawfully withheld or unreasonably delayed", appears to be a particularized restatement of existing judicial practice under section 262 of the Judicial Code (28 U.S.C. 377). *Safeway Stores, Inc.* v. *Brown*, 138 F.2d 278 (E.C.A., 1943), certiorari denied, 320 U.S. 797.

> The power thus stated is vested in "the reviewing court", which, in this context, would seem to be the court which has or would have jurisdiction to review the final agency action. See *Roche* v. *Evaporated Milk Ass'n.*, 319 U.S. 21, 25 (1943). Orders in the nature of a writ of mandamus have been employed to compel an administrative agency to act, *Safeway Stores, Inc.* v. *Brown, supra*, or to assume jurisdiction, *Interstate Commerce Commission* v. *United States ex rel. Humboldt Steamship Co.*, 224 U.S. 474 (1912), or to compel an agency or officer to perform a ministerial or non-discretionary act. Clause (A) of section 10(e) [*i.e.*, Section 706(1)] was apparently intended to codify these judicial functions.
>
> Obviously, the clause does not purport to empower a court to substitute its discretion for that of an administrative agency and thus exercise administrative duties. * * * However, as in *Safeway Stores* v. *Brown*, *supra*, a court may require an agency to take action upon a matter, without directing how it shall act.

Attorney General's Manual 108.[12]

The mandamus remedy that Section 706(1) was "intended to codify" was confined to the ordering of a "precise, definite act * * * about which [an official] had no discretion whatever." *United States ex rel. Dunlop* v. *Black*, 128 U.S. 40, 46 (1888) (quoting *Kendall* v. *United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 613 (1838)); see *ICC* v. *New York, New Haven & Hartford R.R.*, 287 U.S. 178, 204 (1932) (describing mandamus as being limited to the enforcement of "a specific,

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[12] Section 262 of the Judicial Code, referred to in the quoted discussion, is the All Writs Act, ch. 231, § 262, 36 Stat. 1162 (now codified at 28 U.S.C. 1651(a)). Section 262 provided: "The Supreme Court, the circuit courts of appeals, and the district courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law."

unequivocal command"). This Court had repeatedly explained that mandamus was not available to "guide and control [an official's] judgment or discretion in the matters committed to his care," because such "interference of the Courts with the performance of the ordinary duties of the executive departments of the government[] would be productive of nothing but mischief." *Decatur* v. *Paulding*, 39 U.S. (14 Pet.) 497, 515-516 (1840); see *Louisiana* v. *McAdoo*, 234 U.S. 627, 633 (1914) (explaining that courts cannot issue mandamus to direct how an official exercises his judgment or discretion, because to do so "would be to interfere with the ordinary functions of government").[13]

The "existing judicial practice" reflected in *Safeway Stores*, one of the cases relied upon in the *Attorney General's Manual* (at 108), was likewise one permitting a court to order an official to take a distinct "final action," 138 F.2d at 280, without directing the substance of that action. In *Safeway Stores*, the plaintiff sought judicial review of a maximum price regulation promulgated under the Emergency Price Control Act of 1942, ch. 26, 56 Stat. 23, contending that the Price Administrator's failure to rule on its protests to the regulation, or even to conduct a hearing on them, should be treated as a denial of the protests. 138 F.2d at 278-279. The court held that the governing statute allowed judicial review only after a protest was "actually denied by an overt act of the Administrator." *Id.* at 280. The court went on to observe, however, that a party in the plaintiff's position was not "wholly without remedy in case the Price Administrator improperly delays action upon his protest." *Ibid.* "If the Administrator should unreasonably delay *final action*," the

[13] The courts of appeals have analogized the relief available under Section 706(1) to mandamus relief. See, *e.g.*, *Mt. Emmons Mining Co.* v. *Babbitt*, 117 F.3d 1167, 1170 (10th Cir. 1997); *Independence Mining Co.* v. *Babbitt*, 105 F.3d 502, 507 (9th Cir. 1997); *Potomac Elec. Power Co.* v. *ICC*, 702 F.2d 1026, 1034 (D.C. Cir. 1983).

court explained, "it would seem clear that this court, upon a proper showing, may under the authority of Section 262 of the Judicial Code, in aid of its jurisdiction issue an order in the nature of a writ of mandamus directing the Price Administrator to take action upon a pending protest." *Ibid.* (internal citation omitted and emphasis added). Thus, the *Safeway Stores* court made clear that it could exercise mandamus authority to compel an agency to take action on a discrete matter that had been unreasonably delayed—but only in aid of the court's power to review the agency's "final action" when it ultimately was issued, not in the exercise of any broader, free-ranging power to oversee the agency's conduct.

The *Attorney General's Manual* proceeds on the same premise in stating that the court with jurisdiction to grant relief under Section 706(1) is "the court which has or would have jurisdiction to review the final agency action." It equates the "agency action" that a court may compel under Section 706(1) with the "final agency action" that a court may review under Section 706(2). The *Attorney General's Manual* thus does not contemplate that a court may compel conduct under Section 706(1) of an ongoing programmatic nature that is beyond the authority of a court to review under Section 706(2) as confirmed by this Court in *National Wildlife Federation*.

3. Confining Section 706(1) to suits to compel final agency action avoids improper intrusion by courts into agency activities

Construing Section 706(1), consistent with the APA's text, history, and purposes, to permit courts to enforce only clear, non-discretionary duties to take discrete final agency action prevents "interference of the Courts with the performance of the ordinary duties of the executive departments," *Decatur*, 39 U.S. (14 Pet.) at 516, and thereby respects and reinforces the separation of powers under the Constitution.

When a court is asked to order an agency to perform a "precise, definite act" that it "ha[s] no discretion whatever" not to perform, *Black*, 128 U.S. at 46, the court may grant relief against the agency without exercising "any nonjudicial functions," S. Rep. No. 752, *supra*, at 44. The court simply orders the agency to complete the particular agency action that has been unlawfully withheld or unreasonably delayed, without directing what conclusions the agency should reach. See, *e.g.*, *Brock*, 476 U.S. at 260 n.7 (addressing potential availability of an order under Section 706(1) to compel the disposition of an administrative complaint).

That would not be the case, however, if a court were asked to compel an agency to alter its day-to-day administration of a program, such as its ongoing management of public lands. In that situation, the question would not be whether the agency has taken action at all, but instead whether the agency's course of conduct is sufficient to satisfy the typically general standards in the governing statute. And the relief ordered by the reviewing court would not be an order compelling the agency *to act* on a discrete matter, but instead would be an order directing the agency *how to act* in a broad range of matters—*i.e.*, to take steps on a programmatic basis that are different from, or in addition to, the steps that the agency has considered appropriate.[14] Such a case would almost inevitably require a court to substitute its

[14] Indeed, several courts of appeals have held that Section 706(1) authorizes relief "only when there has been a genuine failure to act" by the agency, and not when only the adequacy of the agency's action is at issue. *Ecology Ctr., Inc.* v. *United States Forest Serv.*, 192 F.3d 922, 926 (9th Cir. 1999); accord, *e.g.*, *Sierra Club* v. *Peterson*, 228 F.3d at 568; *Public Citizen* v. *Nuclear Regulatory Comm'n*, 845 F.2d 1105, 1107-1109 (D.C. Cir. 1988); *Gillis* v. *United States Dep't of Health & Human Servs.*, 759 F.2d 565, 578 (6th Cir. 1985). Cf. *ICC* v. *United States ex rel. Humboldt S.S. Co.*, 224 U.S. 474, 485 (1912) (holding that mandamus could issue when "the Commission refused to proceed at all, though the law required it to do so," but could direct the Commission only "to take jurisdiction, not in what manner to exercise it").

judgment and discretion for those of the agency—and to do so on a scale that is incompatible with the measured regime for judicial review of agency action that Congress put in place in the APA, as well as with the role of the federal courts under Article III of the Constitution.[15]

Moreover, unless Section 706(1) is understood to permit courts to "compel" only the same sort of "final agency action" that Section 706(2) permits courts to "set aside," plaintiffs could readily circumvent the limitations on judicial review under Section 706(2). Because "[a]lmost any objection to an agency action can be dressed up as an agency's failure to act," *Public Citizen* v. *Nuclear Regulatory Comm'n*, 845 F.2d 1105, 1108 (D.C. Cir. 1988), a plaintiff could recharacterize a claim that could not satisfy Section 706(2)'s final agency action requirement as a claim under Section 706(1). The plaintiff could thereby obtain under Section 706(1) the very sort of "*wholesale* improvement" of an agency program that *National Wildlife Federation* forbids under Section 706(2). Indeed, the same agency conduct found unreviewable under Section 706(2) in *National Wildlife Federation* itself—"failure to revise land use plans in proper fashion, failure to submit certain recommendations to Congress, failure to consider multiple use, * * * failure to provide required public notice, failure to provide adequate environmental impact statements," 497 U.S. at 891—could then be reviewed as agency action "unlawfully withheld or unreasonably delayed" under Section 706(1).

The Ninth Circuit improperly sanctioned just such an approach in *Montana Wilderness Ass'n* v. *United States Forest Service*, 314 F.3d 1146 (2003), petitions for cert. pending,

[15] See Carol R. Miaskoff, *Judicial Review of Agency Delay and Inaction Under Section 706(1) of the Administrative Procedure Act*, 55 Geo. Wash. L. Rev. 635, 636-637 n.9 (1987) ("[U]nrestrained use of the section 706(1) remedy may offend the doctrine of separation of powers to the extent that courts use this provision to direct the exercise of administrative discretion.").

Nos. 03-109 & 03-123 (filed July 22, 2003). There, the plaintiffs sought review under both Section 706(1) and Section 706(2) of the adequacy of the Forest Service's ongoing management of Montana wilderness study areas under a statute requiring the agency to "maintain their presently existing wilderness character." Montana Wilderness Study Act of 1997, Pub. L. No. 95-150, § 3(a), 91 Stat. 1244. The Ninth Circuit recognized that the suit was not cognizable under Section 706(2), because the Forest Service's challenged conduct "does not fit into any of the statutorily defined categories for agency action," 314 F.3d at 1150 (citing *National Wildlife Federation*, 497 U.S. at 899), and does not "mark the consummation of the [Forest Service's] decisionmaking process," *ibid.* (quoting *Bennett*, 520 U.S. at 178). The Ninth Circuit nonetheless held that the Forest Service's performance of the *same* day-to-day management activities could be challenged under Section 706(1), *id.* at 1151, and it "remand[ed] for trial" on whether "the Forest Service has discharged its duty to administer the [areas] so as to maintain their wilderness character and potential for inclusion in the Wilderness System," *id.* at 1152.

Finally, if Section 706(1) is confined to suits to compel an agency to take the same sort of action that would be reviewable under Section 706(2) as final agency action, interested persons will have a strong incentive to comply with the general requirement under the APA that they present their requests for action to the agency in the first instance, rather than proceed directly to court. See, *e.g.*, *Public Citizen Health Research Group*, 740 F.2d at 29 (explaining that whether FDA was required to issue a rule requiring aspirin warning labels was "a question whose resolution demands FDA's medical expertise in the first instance"). The APA, for example, specifically requires an agency to give an interested person the right to petition for the issuance, amendment, or repeal of a rule. See 5 U.S.C. 553(e); *Auer* v. *Robbins*, 519 U.S. 452, 459 (1997) (stating that a complaint about an agency's failure to amend its regulations should have been presented initially to the agency through a petition for rulemaking). And, although the APA does not similarly require an agency to afford anyone the right to petition for the issuance of an order, an agency may, of course, entertain such a request. If a person presents his request for action to the agency instead of going immediately to court, the agency has the opportunity to consider the relevant issues, develop an administrative record, and issue a decision on the request to the extent the agency deems appropriate, which could, in turn, serve as the basis for any judicial review that may be available under Section 706(2). See generally *Standard Oil*, 449 U.S. at 242-243; *Weinberger* v. *Salfi*, 422 U.S. 749, 765 (1975).[16]

By contrast, if suits were allowed directly under Section 706(1) to challenge an agency's alleged failure to satisfy general statutory standards in its administration of its programs, the courts would be called upon to conduct correspondingly broad-ranging factual inquiries into the manner in which the agency operates on a day-to-day basis (see *Montana Wilderness Ass'n*, 314 F.3d at 1152 (remanding for trial on adequacy of the Forest Service's management of wilderness study areas)), rather than to focus on a discrete "final agency action" and the reasons given for that action by the agency itself in its administrative decision. The result

[16] Although under Section 706, as properly construed, an interested person ordinarily is required to request the agency to take final action (whether in the form of a rule or an order) before bringing suit, it does not follow that every response by an agency to such a request would be subject to judicial review under Section 706(2). Judicial review may be precluded by statute (5 U.S.C. 701(a)(1)), or the matter may be committed to agency discretion by law (5 U.S.C. 701(a)(2)), as would be true of an agency's decision whether to issue an order or rule in the exercise of its enforcement authority. See, *e.g.*, *Heckler* v. *Chaney*, 470 U.S. 832 (1985). In those situations, of course, the bar to judicial review under Section 706(2) may not be circumvented by bringing suit under Section 706(1).

would be to stand the APA on its head by giving Section 706(1)—which was intended to be a narrow avenue of relief available only in extraordinary circumstances to compel performance of a discrete and clearly defined legal duty—the broadest scope of all of the judicial review provisions of the APA.

II. The Court Of Appeals Erred In Holding That Plaintiffs' Challenges To BLM's Management Of Off-Road Vehicle Use On Public Lands Are Cognizable Under Section 706(1)

The court of appeals held that Section 706(1) authorizes the district court to review the adequacy of BLM's ongoing administration of public lands in Utah in three respects: whether BLM is managing the wilderness study areas in accordance with FLPMA's requirement "not to impair the suitability of such areas for preservation as wilderness," 43 U.S.C. 1782(c); whether BLM is obligated to take a "hard look" at whether to supplement its prior environmental analyses under NEPA, 42 U.S.C. 4332(2)(C), to address increased off-road vehicle use on certain public lands; and whether BLM is completing various planning and management objectives identified in its own land use plans on a timely basis. None of those holdings represents a proper application of Section 706(1) under the standards identified above.

A. Courts have no authority under Section 706(1) to review whether BLM is adequately managing public lands to maintain their suitability for preservation as wilderness

The court of appeals erred in holding that Section 706(1) authorizes the district court to entertain SUWA's claim that "BLM has in the past and continues today to permit [off-road vehicles] to impair the suitability of existing [wilderness study areas] from entry into the national wilderness preservation system," in violation of FLPMA. Br. in Opp. App. 21 (second amended complaint), 44 (third amended complaint). That is not a claim to compel a discrete final agency action that BLM is under a mandatory, non-discretionary duty to SUWA to perform. It is instead a broad programmatic challenge, under a general statutory standard, to BLM's ongoing administration of the Utah wilderness study areas. Such challenges are not cognizable under Section 706(1).

Congress has vested the Secretary of the Interior (and BLM as the Secretary's designee) with broad discretion in the management of wilderness study areas. With respect to wilderness study areas, FLPMA states, in general terms:

> During the period of review of such areas and until Congress has determined otherwise, the Secretary shall continue to manage such lands according to his authority under this Act and other applicable law in a manner so as not to impair the suitability of such areas for preservation as wilderness.

43 U.S.C. 1782(c). FLPMA does not specify what would constitute "impair[ment]" of a given area's "suitability" for "preservation as wilderness."[17] Nor does FLPMA identify any discrete final agency action that BLM is required to take in its management of wilderness study areas, such that a failure to take the action would render it "unlawfully withheld or unreasonably delayed" within the meaning of Section 706(1). Much less does FLPMA itself impose any such specific duties on BLM with respect to the particular issue of off-road vehicle use in those areas.

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[17] While the government's certiorari petition and briefs, like the opinions below, sometimes use the shorthand term "non-impairment standard" to refer to the standard stated in the first sentence of 43 U.S.C. 1782(c), it bears emphasis that the statute refers to "impair[ment]" of the "suitability" of an area for preservation as wilderness (*i.e.*, for congressional designation as wilderness), *not* more generally to any diminution in the natural state of lands or resources in a wilderness study area.

1. Plaintiffs' claim does not seek to compel final agency action

SUWA's challenge to BLM's management of the Utah wilderness study areas cannot proceed under Section 706(1), because judicial review under Section 706(1), as under Section 706(2), is confined to final agency action. The complaint does not seek to compel SUWA to take *any* discrete final agency action that is specifically required by FLPMA. Rather, the pertinent count of the complaint seeks "a general judicial review of the BLM's day-to-day operations," *National Wildlife Federation*, 497 U.S. at 899, under the general non-impairment standard of 43 U.S.C. 1782(c) with respect to off-road vehicle management. Neither of the courts below read the complaint otherwise.

As this Court explained in *National Wildlife Federation*, an agency's "day-to-day operations," including its management of public lands, do not constitute "an identifiable 'agency action'" under the APA, "much less a 'final agency action.'" 497 U.S. at 890-891. The Court's reasoning, although directed to a claim under Section 706(2), is equally applicable to SUWA's non-impairment claim under Section 706(1), because the APA does not distinguish between those provisions in confining judicial review to "agency action" and, in the absence of a statute providing otherwise, to "final agency action." See pp. 13-18, *supra*. Thus, as Judge McKay observed below, "review under the APA is strictly reserved for cases addressing *specific instances* of agency action or inaction rather than programmatic attacks" of the sort involved here. Pet. App. 42a (McKay, J., dissenting in part).

The court of appeals reasoned that Section 706(1) allows a court to review, and thus to remedy, any claim that an agency has not fully adhered to a general statutory standard in its ongoing administration of a program. After observing that "the APA treats an agency's inaction as 'action,'" the court stated that "the agency's inaction under these circumstances is, in essence, the same as if the agency had issued a final order or rule declaring that it would not complete its legally required duty." Pet. App. 16a. The court's analysis is untenable. Although the APA defines "agency action" to include, as appropriate, "failure to act," 5 U.S.C. 551(13), the latter term refers only to a failure to take discrete agency action, such as issuance of a "rule" or "order," because the term takes its meaning from such more specific examples of affirmative agency action in the statutory definition. See pp. 13-14, *supra*. It does not follow, as the court of appeals erroneously believed, that any and all varieties of agency inaction—or even, as here, allegedly inadequate action—can be equated with "a final order or rule" (Pet. App. 16a) and reviewed under Section 706(1) or Section 706(2). Moreover, the inclusion of "failure to act" in the statutory definition of "agency action" has no apparent relevance to Section 706(1), because it would make no sense to speak of a court's "compel[ling] [a failure to act] unlawfully withheld or unreasonably delayed." 5 U.S.C. 706(1).

Here, as noted above, BLM is under no statutory obligation to take any particular final agency action in its management of off-road vehicle use in wilderness study areas. Although BLM has discretion to address issues of off-road vehicle use by taking some form of final agency action (see Pet. App. 18a n.10), that does not mean that BLM's allegedly inadequate response to those issues is reviewable under Section 706(1).

2. Plaintiffs' claim does not seek to enforce a mandatory, non-discretionary duty

The court of appeals' holding that SUWA's statutory non-impairment claim may proceed under Section 706(1) is also contrary to the understanding that Section 706(1) authorizes only relief in the nature of mandamus, *i.e.*, to "require an agency to take action upon a matter, without directing how it shall act." *Attorney General's Manual* 108. Neither SUWA

nor the court of appeals disputed that BLM is, in fact, taking measures to prevent impairment of the suitability of the Utah wilderness study areas for wilderness protection, including measures to regulate off-road vehicles. Accordingly, in order to decide whether SUWA would be entitled to any relief on remand, the district court would have to determine whether those measures are sufficient to satisfy FLPMA's general non-impairment standard and, if not, to order BLM to take different or additional measures. Such an order would necessarily entail the court's directing the agency how to exercise its discretion on an ongoing programmatic basis. See Pet. App. 46a (McKay, J., dissenting in part) (observing that any remedy granted on remand in this case "would involve the district court in the ongoing review of every management decision allegedly threatening achievement of the nonimpairment mandate").

The court of appeals assumed that Section 706(1) permits judicial review of an agency's compliance with any "mandatory" statutory standard—here, that "the Secretary *shall* continue to manage [wilderness study areas] * * * so as not to impair the[ir] suitability * * * for preservation as wilderness," 43 U.S.C. 1782(c) (emphasis added)—regardless of the degree of generality with which the standard is phrased or the degree of discretion that is vested in the agency to define and achieve that standard. See Pet. App. 14a. The court of appeals disregarded settled mandamus law incorporated into Section 706(1). Under that law, if a plaintiff is seeking relief that would "guide and control [an official's] judgment or discretion in the matters committed to his care," *Decatur*, 39 U.S. (14 Pet.) at 515, a court has no authority to order it, even if the official is *required*, not merely *permitted*, to exercise his judgment or discretion in the matter. See, *e.g.*, *New York, New Haven & Hartford R.R.*, 287 U.S. at 192-204 (holding that, when a statute required the ICC to prepare a valuation of railroad property,

but did not specify the methodology to be used in any "clear and peremptory" way, mandamus could not issue to direct how the ICC was to conduct the valuation). Accordingly, having recognized that BLM has wide "discretion" in its "interpretation" and "implementation" of FLPMA's non-impairment standard (Pet. App. 14a) (emphasis omitted), the court of appeals was required to hold that Section 706(1) does not provide a vehicle for guiding that discretion.

To be sure, when a statute requires an official to take some action that involves the exercise of judgment or discretion, and the official fails to act *at all*, Section 706(1) or mandamus may be invoked "not [to] ask for a decision any particular way but only that it be made one way or the other." *Work* v. *United States ex rel. Rives*, 267 U.S. 175, 184 (1925); see *Attorney General's Manual* 108. No such relief would be warranted in this case, however, because SUWA acknowledged that BLM is taking measures to prevent impairment of the suitability of the Utah wilderness study areas for wilderness designation. Moreover, the relief that SUWA has sought in this case is not merely a judicial order, essentially in the terms of FLPMA itself, directing BLM to manage the wilderness study areas "so as not to impair the[ir] suitability * * * for preservation as wilderness." 43 U.S.C. 1782(c). Rather, SUWA has sought to compel measures, such as the closing of certain areas to off-road vehicles, that do not appear in Section 1782(c) itself and that BLM has broad discretion under FLPMA to select or reject in determining how most appropriately to satisfy the general statutory standard of non-impairment of the suitability of the overall tract for preservation as wilderness.

The court of appeals expressed concern that, if judicial review was not available under Section 706(1) in cases such as this one, "a 'no-man's-land' of judicial review" would exist, "in which a federal agency could fl[ou]t mandatory, non-discretionary duties simply because it might be able to

satisfy these duties through some form of non-final action." Pet. App. 18a n.10. The court's concern is unwarranted. As explained above, if a person believes that an agency is not administering a program in accordance with statutory requirements, the appropriate course is to request particular action from the agency itself in the first instance. If the agency's response constitutes final agency action—and if requirements of standing, ripeness, and reviewability under the APA are satisfied—that action could be reviewed under Section 706(2) based on the administrative record. In any event, as the Attorney General's Committee on Administrative Procedure recognized, judicial review is not the only mechanism—and often is not the most appropriate mechanism—for assuring that agencies adequately perform their statutory responsibilities, especially in a climate of limited resources. See pp. 21-22, *supra*.

B. Courts have no authority under Section 706(1) to order BLM to consider whether to undertake supplemental environmental analyses under NEPA

The court of appeals also erred in concluding that BLM could be compelled under Section 706(1) to take a "hard look" at whether increased off-road vehicle use in certain areas warranted the preparation of supplemental environmental analyses under NEPA. See Pet. App. 32a-39a. An environmental impact statement or environmental assessment under NEPA is not, in and of itself, final agency action reviewable under the APA. Nor is BLM subject to any mandatory, non-discretionary duty of the sort that may be compelled under Section 706(1) to consider whether to supplement its prior NEPA environmental analyses in the circumstances here.

NEPA requires a federal agency to prepare an environmental impact statement, or EIS, only when the agency is proposing "legislation or other *major Federal actions* significantly affecting the quality of the human environment."

42 U.S.C. 4332(2)(C) (emphasis added). An environmental impact statement is designed to "focus[] Government and public attention on the environmental effects of proposed agency action" so that "the agency will not act on incomplete information" and "the public and other government agencies [can] react to the effects of a proposed action at a meaningful time." *Marsh* v. *Oregon Natural Res. Council*, 490 U.S. 360, 371 (1989). An agency may undertake an environmental assessment to determine whether the proposed action requires an environmental impact statement. See 40 C.F.R. 1501.4(b), 1508.9(a)(1), 1508.13.

An agency is required to supplement an existing environmental impact statement only in response to "substantial changes in *the proposed action* that are relevant to environmental concerns" or "significant new circumstances or information relevant to environmental concerns and bearing on *the proposed action* or its impacts." 40 C.F.R. 1502.9(c)(1)(i) and (ii) (emphases added). In that specific context—namely, when the major federal action to which the initial environmental impact statement was addressed has not yet been taken or completed—an agency must take a "hard look" at intervening developments relevant to environmental concerns to determine whether supplementation is required before it takes or completes the action. As this Court has explained, NEPA "require[s] that agencies take a 'hard look' at the environmental effects of their planned action, even after a proposal has received initial approval," but only "[i]f there remains 'major Federal actio[n]' to occur." *Marsh*, 490 U.S. at 374; see 40 C.F.R. 1500.1(b) ("NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken.").

An environmental impact statement is not itself "final agency action" within the meaning of the APA. Standing alone, an environmental impact statement does not create

rights or obligations or produce other legal consequences. See *Bennett*, 520 U.S. at 177-178. It is instead a procedural prerequisite to taking some *other* step that may, in turn, qualify as "final agency action" reviewable under Section 706(2) of the APA—namely, a decision by the agency to undertake a "major Federal action" that is subject to NEPA. See *Robertson* v. *Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) ("NEPA itself does not mandate particular results, but simply prescribes the necessary process."). Such "preliminary, procedural, or intermediate agency action," as distinguished from final agency action, is "not directly reviewable" under the APA, although it "is subject to review on the review of the final agency action." 5 U.S.C. 704; see *Standard Oil*, 449 U.S. at 244-245 (discussing APA's treatment of preliminary action); see also, *e.g.*, *Marsh*, 490 U.S. at 368, 375-378 (reviewing adequacy of EIS and refusal to supplement it in context of APA challenge under Section 706(2) to "major Federal action" of decision to construct dam); *Robertson*, 490 U.S. at 345-346 (reviewing adequacy of EIS in context of challenge to "major Federal action" of decision to issue permit for ski area). For those reasons, neither an agency's preparation of an environmental impact statement nor an agency's "hard look" at whether to supplement an existing one is itself the sort of undertaking that may independently be compelled under Section 706(1).

In any event, as explained above, BLM has no clear, nondiscretionary duty of the sort that may be enforced under Section 706(1) to take a "hard look" at whether to supplement its environmental impact statements and environmental assessments for the areas of land involved in this case. Such a duty exists only when an agency is proposing to take a new "major Federal action" or deciding whether to make substantial changes to a previously analyzed action that has not been completed. 42 U.S.C. 4332(2)(C); see *Kleppe* v. *Sierra Club*, 427 U.S. 390, 401 (1976); *Northcoast*

Envtl. Ctr. v. *Glickman*, 136 F.3d 660, 670 (9th Cir. 1998) (NEPA analysis not required in absence of "discrete agency action"). Neither SUWA's NEPA claim nor the court of appeals' ruling allowing that claim to go forward rests on the premise that BLM was proposing any "major Federal action" for those lands, or even that it had rendered a final decision rejecting a petition to take such action. SUWA may well believe that BLM *should* take certain action (such as promulgating new rules governing off-road vehicle use), preceded by an appropriate NEPA analysis to address the environmental concerns that it has identified. And, if BLM were to issue a final decision to take (or not to take) such action, SUWA could seek review of *that* decision (to the extent that review would be available under Section 706(2) of the APA), including review of any NEPA analysis that BLM conducted or allegedly should have conducted in connection with its decision. But NEPA imposes no free-standing obligation on BLM to conduct an environmental analysis divorced from a proposed "major Federal action," and SUWA has no free-standing right enforceable under Section 706(1) to compel BLM to do so.

The Tenth Circuit's holding that BLM can be compelled to take a "hard look" at whether to undertake supplemental NEPA analyses (and to perform other tasks) is particularly troubling in light of the court's suggestions that BLM's resource constraints could not provide any justification for denying such relief under Section 706(1). Pet. App. 37a-38a. The court stated that an "inadequate resource defense must be reserved for any contempt proceedings that might arise if the agency fails to carry out a mandatory duty after being ordered to do so by a court." *Id.* at 38a; cf. *Sierra Club* v. *Thomas*, 828 F.2d 783, 798 (D.C. Cir. 1987) (taking agency's "broad mandate" and "finite resources" into account in determining that agency action should not be compelled under Section 706(1)). The court similarly disregarded

BLM's assurances that NEPA analyses would, in fact, be conducted in the near future as circumstances permitted in connection with its contemplated revision of land use plans. Pet. App. 38a. The court's holding that Section 706(1) may be invoked to reorder agency priorities for the allocation of scarce resources—under the threat of contempt proceedings that would divert agency officials from their usual duties and brand them as miscreants—would be inimical to the effective functioning of government and to the separation of powers. Cf. *Coker* v. *Sullivan*, 902 F.2d 84, 89 (D.C. Cir. 1990) (R.B. Ginsburg, J.) (observing that, when an agency "has many programs to supervise and may consciously have decided to concentrate monitoring on some elements of [one] program rather than others," a court "should not steer the [agency's] resources and shape its priorities when [the court] lack[s] knowledge of the matters competing for the [agency's] attention").

C. Courts have no authority under Section 706(1) to compel BLM to perform planning and management tasks identified in its land use plans

The court of appeals erred in concluding that BLM could be ordered under Section 706(1) to perform tasks—such as monitoring off-road vehicle use, disseminating information on off-road vehicle restrictions, and preparing an off-road vehicle plan—that the agency identified in its land use plans for the areas involved in this case. A land use plan is a tool to guide BLM's management of public lands, including BLM's taking of future site-specific actions in the area covered by the plan. The identification in a land use plan of objectives that BLM seeks to achieve or tasks that BLM intends to perform in the future does not convert those objectives and tasks into mandatory, non-discretionary duties that are owed to particular members of the public and are independently enforceable under Section 706(1). Nor do the tasks identified in a land use plan typically involve the

taking of final agency action that can be either compelled under Section 706(1) or set aside under Section 706(2).

1. A BLM land use plan is not a source of mandatory, non-discretionary duties that may be enforced under Section 706(1)

a. FLPMA provides that the Secretary of the Interior (and BLM as the Secretary's designee) "shall * * * develop, maintain, and, when appropriate, revise land use plans which provide by tracts or areas for the use of the public lands." 43 U.S.C. 1712(a). FLPMA describes land use planning as a process for "project[ing]" the "present and future use" of public lands and resources. 43 U.S.C. 1701(a)(2). The House Report elaborates that land use planning under FLPMA is to be "dynamic and subject to change with changing conditions and values." H.R. Rep. No. 1163, 94th Cong., 2d Sess. 5 (1976). Although FLPMA articulates general criteria to guide BLM's creation and revision of land use plans—such as to "use and observe the principles of multiple use and sustained yield," "give priority to the designation and protection of areas of critical environmental concern," and "weigh long-term benefits to the public against short-term benefits," 43 U.S.C. 1712(c)(1), (3), and (7)—FLPMA does not require BLM to resolve any particular issues or to reach any particular results in such plans.

BLM's implementing regulations likewise reflect that land use plans are a step in the process of deciding how particular lands and resources are to be managed. The regulations explain that a land use plan is "designed to guide and control future management actions and the development of subsequent, more detailed and limited scope plans for resources and uses." 43 C.F.R. 1601.0-2. A land use plan thus "generally establishes," among other things, "[l]and areas for limited, restricted or exclusive use," "[a]llowable resource uses," "[r]esource condition goals and objectives," "general management practices," and "[s]upport action, including

such measures as resource protection, access development, [and] realty action." 43 C.F.R. 1601.0-5(k). A land use plan "is not a final implementation decision on actions which require further specific plans, process steps, or decisions under specific provisions of law and regulations." *Ibid.* And BLM may amend or revise a land use plan as circumstances warrant. See 43 C.F.R. 1601.5-5, 1601.5-6.

A single land use plan may exceed 100 pages in length, cover an area of more than a million acres, and address numerous and diverse projected activities and tasks involving, for example, wildlife habitat protection, mineral extraction, livestock grazing, identification of cultural resources, management of off-road vehicles, and development of campgrounds and other recreational facilities. When, and even whether, any particular goal or future task identified in a land use plan will be accomplished is necessarily contingent on available resources, competing agency priorities, and other factors that may change over time. As BLM explained in one of the land use plans sought to be enforced in this case, its "ability to complete the identified projects is directly dependent on the BLM budgeting process," and "[t]he priorities for accomplishment * * * may be revised based upon changes in law, regulations, policy, or economic factors such as cost-effectiveness of projects." BLM, *Resource Management Plan Record of Decision and Rangeland Program Summary for the San Juan Resource Area* 15 (Mar. 1991). A number of other land use plans for areas involved in this case contain similar cautionary language.[18]

[18] See St. George Field Office, BLM, *Record of Decision and Resource Management Plan* 1.7-1.8 (Mar. 1999) ("In implementing the Plan, BLM will focus its limited resources at any given time on those highest priority issues which BLM determines have the greatest significance to the health of the public lands involved and the socioeconomic well-being of local communities dependent on them. Less important issues will be deferred until priority programs and projects are implemented and found to be effective."); Vernal Dist. Office, BLM, *Diamond Mountain Resource Area Resource Management Plan and Record of Decision* 4-1 (Fall 1994) ("Implementation of many of the planned actions in this RMP is dependent upon the availability of funding and personnel."); Salt Lake Dist., BLM, *Record of Decision and Rangeland Program Summary for the Box Elder Resource Management Plan* 1 (1986) ("The ability of the Salt Lake District to complete the identified projects is directly dependent upon the BLM budgeting process. The priorities for accomplishment will be reviewed annually and may be revised based upon changes in law, regulations, policy, or economic factors such as cost effectiveness of projects."); Vernal Dist. Office, BLM, *Record of Decision and Rangeland Program Summary for the Book Cliffs Resource Management Plan* 1 (May 1985) ("The ability of the Vernal District to complete the identified projects is directly dependent upon the BLM budgeting process. If insufficient funding is appropriated for any given year, some delays in the completion schedule may result."); Cedar City Dist. Office, BLM, *Cedar Beaver Garfield Antimony Resource Management Plan* 3 (Oct. 1984) ("Implementation of many actions will be tied to the budget and funding allocations through the Annual Work Planning process. Completion of these projects will be dependent on receiving adequate funding allocations. Many funding decisions are made outside of the planning system and affect the achievement of program objectives and implementation of management actions.").

This Court has recognized that the Forest Service's forest plans, which resemble BLM's land use plans, are "tools for agency planning and management," "merely programmatic in nature," subject to continuing revision and refinement, and "often not fully implemented." *Ohio Forestry Ass'n* v. *Sierra Club*, 523 U.S. 726, 735-737 (1998). The Court explained that such plans, in and of themselves, "do not command anyone to do anything or to refrain from doing anything"; "do not grant, withhold, or modify any formal legal license, power, or authority"; "do not subject anyone to any civil or criminal liability," and "create no legal rights or obligations." *Id.* at 733. The Court therefore held that a challenge to provisions of a forest plan that allowed certain types of logging within a national forest was not ripe for adjudication, because no such logging could occur until the Forest Service rendered a final administrative decision to

permit logging at a specific site, which would itself be final agency action reviewable under the APA. See *id.* at 733-737.

b. BLM's land use plans, given their character as dynamic tools to guide BLM's management, planning, and future site-specific activities, are not the source of duties to perform particular tasks that are independently enforceable under Section 706(1). The identification in a land use plan of the various tasks that BLM *voluntarily* intends to undertake in an area does not transform those tasks into *mandatory, non-discretionary* duties that BLM owes to particular members of the public and that BLM may be compelled by a court to undertake. A land use plan cannot be equated with, for example, a command in an Act of Congress to complete specific agency action within a specific period of time. See, *e.g.*, *Forest Guardians* v. *Babbitt*, 174 F.3d 1178 (10th Cir. 1999) (enforcing duty to designate critical habitat of a species under Endangered Species Act by specified statutory deadline). In contrast to such a statute, a BLM land use plan is not "an administrative straight-jacket which eliminates the room for any flexibility to meet changing conditions." *NRDC, Inc.* v. *Hodel*, 624 F. Supp. 1045, 1060 (D. Nev. 1985), aff'd, 819 F.2d 927 (9th Cir. 1987).

To order BLM to complete a particular task identified in a land use plan—in contravention of the agency's own priorities for the use of its limited resources—would be to intrude into BLM's discretion with regard to land use planning and management. Such interference with BLM's "ordinary duties * * * would be productive of nothing but mischief," *Decatur*, 39 U.S. (14 Pet.) at 516, for it would permit private litigants and courts to set BLM's agenda for its administration of public lands. As Judge McKay observed in dissent below, allowing "plaintiffs of all varieties" to use Section 706(1) to challenge an agency's failure to meet every objective in a land use plan would "substantially impede an agency's day-to-day operations." Pet. App. 50a. It could

ultimately encourage agencies to draft land use plans that are unduly circumscribed in their goals and unduly general in their projected means, and thus less useful for the purposes that Congress and BLM intended.

Contrary to the court of appeals' view, neither FLPMA nor BLM's implementing regulations contemplates that the planning and management tasks identified in a land use plan are to be independently enforceable under Section 706(1). Both FLPMA's provision that "[t]he Secretary shall manage the public lands * * * in accordance with the land use plan developed by him," 43 U.S.C. 1732(a), and the regulations' requirement that "[a]ll future resource management authorizations and actions * * * shall conform to the approved plan," 43 C.F.R. 1610.5-3(a), simply prevent BLM "from approving or undertaking affirmative projects inconsistent with its land use plans." Pet. App. 49a (McKay, J., dissenting in part). Thus, while the regulations require that any *future* final agency action that BLM elects to undertake be consistent with the land use plan, they do not suggest that BLM has a mandatory, judicially enforceable duty to accomplish any particular objective or undertake any particular activity identified in the plan itself.

The court of appeals also relied on 43 C.F.R. 1601.0-5(c), which it misinterpreted as requiring BLM to "adhere" to the "terms, conditions, and decisions" in its land use plans, and thereby as imposing a judicially enforceable duty to complete all tasks identified in a land use plan. See Pet. App. 26a, 29a. That regulation is concerned with the separate issue of consistency between BLM's land use plans and the plans of *other* agencies. See 43 C.F.R. 1610.3-2. It has nothing to with whether provisions in BLM's *own* plans create mandatory, non-discretionary duties that may be enforced under Section 706(1).[19]

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[19] In 43 C.F.R. 1601.0-5(c), on which the court of appeals relied, the term "consistent" is defined as "mean[ing] the Bureau of Land

As Judge McKay recognized, therefore, "successful challenges to land use plans have only involved *final* agency decisions made pursuant to existing land use plans." Pet. App. 49a-50a. Nothing in FLPMA or BLM's regulations confers a right on any private person to insist that particular objectives or tasks identified in a land use plan be accomplished. Nor does anything in FLPMA or the regulations confer a right on any private person to challenge alleged deficiencies in BLM's general managerial performance under land use plans, including any failure to complete the sorts of monitoring and subsidiary planning activities that were the focus of SUWA's challenge at the preliminary injunction stage of this case.

2. The tasks identified in BLM's land use plans generally do not require the taking of final agency action that may be compelled under Section 706(1)

In any event, even if BLM's land use plans could be a source of some mandatory, non-discretionary duties enforceable under Section 706(1), a court could enforce only a duty to do something that, once done, would be final agency action within the meaning of the APA. The tasks set forth in a land use plan do not, for the most part, constitute measures that, if completed, would be final agency action reviewable under Section 706(2).

For example, to the extent that SUWA's complaint refers to specific tasks identified in BLM's land use plans that

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Management plans will adhere to the terms, conditions, and decisions of officially approved and adopted resource related plans, or in their absence, with policies and programs." The concept of "consistency" is addressed in substantive terms in 43 C.F.R. 1610.3-2(a), which provides that BLM's land use plans "shall be consistent with officially approved or adopted resource related plans * * * of *other* Federal agencies, State and local governments and Indian tribes," so long as BLM's plans are also consistent with the purposes, policies, and programs of federal laws applicable to public lands (emphasis added).

allegedly had not been completed when the complaint was filed, most of those tasks involve day-to-day planning and management activities, not final agency action. They include such activities as "the preparation of maps and other informational materials for distribution to the public, the creation of monitoring plans and protocols, and the marking and signing of designated trails." Br. in Opp. App. 16, 20 (second amended complaint); see *id.* at 39-43 (third amended complaint). The performance of such tasks does not constitute final agency action for purposes of APA review. Such performance does not "mark the 'consummation' of the agency's decisionmaking process" on any discrete matter and does not determine "rights or obligations" or otherwise carry "legal consequences." *Bennett*, 520 U.S. at 178.

Other tasks enumerated by SUWA, such as "the preparation of detailed [off-road vehicle] implementation plans and/or [off-road vehicle] travel plans," may constitute final agency action when completed. Br. in Opp. App. 20. A subsidiary planning document that opens or closes particular routes to off-road vehicles would ordinarily be the sort of discrete agency action that concludes the agency's decisionmaking and "by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett*, 520 U.S. at 178. The San Rafael Route Designation Plan—which was completed in February 2003, thereby mooting SUWA's claim to compel it—contains restrictions of that variety. See *San Rafael Route Designation Plan* (visited Jan. 2, 2004) <http://www.ut.blm.gov/sanrafaelohv/decision.htm>. But whether such planning documents will amount to final agency action can often be ascertained only after they have been prepared. And, in any event, at least in the absence of an express statement in the land use plan itself, a plan provision contemplating the preparation of such documents does not create any mandatory, non-discretionary duty to issue them or give rise to any judicially enforceable

private right to insist that BLM do so. For these reasons, such a plan provision is not judicially enforceable under Section 706(1).

* * * * *

In sum, an agency's ongoing programmatic activities are not subject to judicial review under Section 706(1), just as they are not subject to judicial review under Section 706(2), as this Court made clear in *National Wildlife Federation*. The invocation of Section 706(1) sanctioned by the Tenth Circuit in this case would permit courts to engage in wide-ranging review of an agency's entire course of conduct, to order systemic changes in an agency's day-to-day operations that were not even sought from the agency in the first instance, and to divert scarce resources from the activities chosen by the agency. Such judicial intrusion into the responsibilities of the Executive Branch is inconsistent with the separation of powers under the Constitution. As this Court recognized in *National Wildlife Federation*, plaintiffs "cannot seek *wholesale* improvement of [an agency's] program by court decree, rather than in the offices of the Department or the halls of Congress, where programmatic improvements are normally made." 497 U.S. at 891; accord Pet. App. 42a-43a (McKay, J., dissenting in part). That principle applies equally under Section 706(1) as under Section 706(2).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

1. 5 U.S.C. 551 provides:

Definition

For the purpose of this subchapter—

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

or except as to the requirements of section 552 of this title—

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41; subchapter II of chapter 471 of title 49; or sections 1884, 1891-1902, and former section 1641(b)(2), of title 50, appendix;

(2) "person" includes an individual, partnership, corporation, association, or public or private organization other than an agency;

(3) "party" includes a person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in an agency proceeding, and a person or agency admitted by an agency as a party for limited purposes;

(4) "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing;

(5) "rule making" means agency process for formulating, amending, or repealing a rule;

(6) "order" means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing;

(7) "adjudication" means agency process for the formulation of an order;

(8) "license" includes the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission;

(9) "licensing" includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license;

(10) "sanction" includes the whole or a part of an agency—

(A) prohibition, requirement, limitation, or other condition affecting the freedom of a person;

(B) withholding of relief;

(C) imposition of penalty or fine;

(D) destruction, taking, seizure, or withholding of property;

(E) assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees;

(F) requirement, revocation, or suspension of a license; or

(G) taking other compulsory or restrictive action;

(11) "relief" includes the whole or a part of an agency—

(A) grant of money, assistance, license, authority, exemption, exception, privilege, or remedy;

(B) recognition of a claim, right, immunity, privilege, exemption, or exception; or

(C) taking of other action on the application or petition of, and beneficial to, a person;

(12) "agency proceeding" means an agency process as defined by paragraphs (5), (7), and (9) of this section;

(13) "agency action" includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act; and

(14) "ex parte communication" means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given,

but it shall not include requests for status reports on any matter or proceeding covered by this subchapter.

2. 5 U.S.C. 701 provides:

Application; definitions

(a) This chapter applies, according to the provisions thereof, except to the extent that—

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

(b) For the purpose of this chapter—

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41; subchapter II of chapter 471 of title 49; or sections 1884, 1891-1902, and former section 1641(b)(2), of title 50, appendix; and

(2) "person", "rule", "order", "license", "sanction", "relief", and "agency action" have the meanings given them by section 551 of this title.

3. 5 U.S.C. 702 provides:

Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

4. 5 U.S.C. 703 provides:

Form and venue of proceeding

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action,

including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

5. 5 U.S.C. 704 provides:

Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

6. 5 U.S.C. 705 provides:

Relief pending review

When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be

taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

7. 5 U.S.C. 706 provides:

Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

8. 42 U.S.C. 4332 provides in part:

Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall—

* * * * *

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes;

* * * * *

9. 43 U.S.C. 1712 provides in part:

Land use plans

(a) Development, maintenance, and revision by Secretary

The Secretary [of the Interior] shall, with public involvement and consistent with the terms and conditions of this Act, develop, maintain, and, when appropriate, revise land use plans which provide by tracts or areas for the use of the public lands. Land use plans shall be developed for the public lands regardless of whether such lands previously have been classified, withdrawn, set aside, or otherwise designated for one or more uses.

* * * * *

(c) Criteria for development and revision

In the development and revision of land use plans, the Secretary shall—

(1) use and observe the principles of multiple use and sustained yield set forth in this and other applicable law;

(2) use a systematic interdisciplinary approach to achieve integrated consideration of physical, biological, economic, and other sciences;

(3) give priority to the designation and protection of areas of critical environmental concern;

(4) rely, to the extent it is available, on the inventory of the public lands, their resources, and other values;

(5) consider present and potential uses of the public lands;

(6) consider the relative scarcity of the values involved and the availability of alternative means (including recycling) and sites for realization of those values;

(7) weigh long-term benefits to the public against short-term benefits;

(8) provide for compliance with applicable pollution control laws, including State and Federal air, water, noise, or other pollution standards or implementation plans; and

(9) to the extent consistent with the laws governing the administration of the public lands, coordinate the land use inventory, planning, and management activities of or for such lands with the land use planning and management programs of other Federal departments and agencies and of the States and local governments within which the lands are located, including, but not limited to, the statewide outdoor recreation plans developed under the Act of September 3, 1964 (78 Stat. 897), as amended [16 U.S.C.A. § 460l-4 et seq.], and of or for Indian tribes by, among other things, considering the policies of approved State and tribal land resource management programs. In implementing this directive, the Secretary

shall, to the extent he finds practical, keep apprised of State, local, and tribal land use plans; assure that consideration is given to those State, local, and tribal plans that are germane in the development of land use plans for public lands; assist in resolving, to the extent practical, inconsistencies between Federal and non-Federal Government plans, and shall provide for meaningful public involvement of State and local government officials, both elected and appointed, in the development of land use programs, land use regulations, and land use decisions for public lands, including early public notice of proposed decisions which may have a significant impact on non-Federal lands. Such officials in each State are authorized to furnish advice to the Secretary with respect to the development and revision of land use plans, land use guidelines, land use rules, and land use regulations for the public lands within such State and with respect to such other land use matters as may be referred to them by him. Land use plans of the Secretary under this section shall be consistent with State and local plans to the maximum extent he finds consistent with Federal law and the purposes of this Act.

* * * * *

10. 43 U.S.C. 1732 provides in part:

Management of use, occupancy, and development of public lands

(a) Multiple use and sustained yield requirements applicable; exception

The Secretary shall manage the public lands under principles of multiple use and sustained yield, in accordance with the land use plans developed by him under section 1712 of this title when they are available, except that where a tract of such public land has been dedicated to specific uses

according to any other provisions of law it shall be managed in accordance with such law.

* * * * *

11. 43 U.S.C. 1782 provides:

Bureau of Land Management Wilderness Study

(a) Lands subject to review and designation as wilderness

Within fifteen years after October 21, 1976, the Secretary shall review those roadless areas of five thousand acres or more and roadless islands of the public lands, identified during the inventory required by section 1711(a) of this title as having wilderness characteristics described in the Wilderness Act of September 3, 1964 (78 Stat. 890; 16 U.S.C. 1131 et seq.) and shall from time to time report to the President his recommendation as to the suitability or nonsuitability of each such area or island for preservation as wilderness: Provided, That prior to any recommendations for the designation of an area as wilderness the Secretary shall cause mineral surveys to be conducted by the United States Geological Survey and the United States Bureau of Mines to determine the mineral values, if any, that may be present in such areas: Provided further, That the Secretary shall report to the President by July 1, 1980, his recommendations on those areas which the Secretary has prior to November 1, 1975, formally identified as natural or primitive areas. The review required by this subsection shall be conducted in accordance with the procedure specified in section 3(d) of the Wilderness Act [16 U.S.C.A. § 1132(d)].

(b) Presidential recommendation for designation as wilderness

The President shall advise the President of the Senate and the Speaker of the House of Representatives of his recommendations with respect to designation as wilderness

of each such area, together with a map thereof and a definition of its boundaries. Such advice by the President shall be given within two years of the receipt of each report from the Secretary. A recommendation of the President for designation as wilderness shall become effective only if so provided by an Act of Congress.

(c) Status of lands during period of review and determination

During the period of review of such areas and until Congress has determined otherwise, the Secretary shall continue to manage such lands according to his authority under this Act and other applicable law in a manner so as not to impair the suitability of such areas for preservation as wilderness, subject, however, to the continuation of existing mining and grazing uses and mineral leasing in the manner and degree in which the same was being conducted on October 21, 1976: Provided, That, in managing the public lands the Secretary shall by regulation or otherwise take any action required to prevent unnecessary or undue degradation of the lands and their resources or to afford environmental protection. Unless previously withdrawn from appropriation under the mining laws, such lands shall continue to be subject to such appropriation during the period of review unless withdrawn by the Secretary under the procedures of section 1714 of this title for reasons other than preservation of their wilderness character. Once an area has been designated for preservation as wilderness, the provisions of the Wilderness Act [16 U.S.C.A. § 1131 et seq.] which apply to national forest wilderness areas shall apply with respect to the administration and use of such designated area, including mineral surveys required by section 4(d)(2) of the Wilderness Act [16 U.S.C.A. § 1133(d)(2)], and mineral development, access, exchange of lands, and ingress and egress for mining claimants and occupants.

12. 43 C.F.R. 1601.0-2 provides:

Objective.

The objective of resource management planning by the Bureau of Land Management is to maximize resource values for the public through a rational, consistently applied set of regulations and procedures which promote the concept of multiple use management and ensure participation by the public, state and local governments, Indian tribes and appropriate Federal agencies. Resource management plans are designed to guide and control future management actions and the development of subsequent, more detailed and limited scope plans for resources and uses.

13. 43 C.F.R. 1601.0-5 provides in part:

Definitions.

* * * * *

(c) "Consistent" means that the Bureau of Land Management plans will adhere to the terms, conditions, and decisions of officially approved and adopted resource related plans, or in their absence, with policies and programs, subject to the qualifications in § 1615.2 of this title.

* * * * *

(k) "Resource management plan" means a land use plan as described by the Federal Land Policy and Management Act. The resource management plan generally establishes in a written document:

(1) Land areas for limited, restricted or exclusive use; designation, including ACEC designation; and transfer from Bureau of Land Management Administration;

(2) Allowable resource uses (either singly or in combination) and related levels of production or use to be maintained;

(3) Resource condition goals and objectives to be attained;

(4) Program constraints and general management practices needed to achieve the above items;

(5) Need for an area to be covered by more detailed and specific plans;

(6) Support action, including such measures as resource protection, access development, realty action, cadastral survey, etc., as necessary to achieve the above;

(7) General implementation sequences, where carrying out a planned action is dependent upon prior accomplishment of another planned action; and

(8) Intervals and standards for monitoring and evaluating the plan to determine the effectiveness of the plan and the need for amendment or revision.

It is not a final implementation decision on actions which require further specific plans, process steps, or decisions under specific provisions of law and regulations.

14. 43 C.F.R. 1610.3-2 provides in part:

Consistency requirements.

(a) Guidance and resource management plans and amendments to management framework plans shall be consistent with officially approved or adopted resource related plans, and the policies and programs contained therein, of other Federal agencies, State and local governments and Indian tribes, so long as the guidance and resource management plans are also consistent with the purposes, policies and programs of Federal laws and regulations applicable to

public lands, including Federal and State pollution control laws as implemented by applicable Federal and State air, water, noise, and other pollution standards or implementation plans.

* * * * *

15. 43 C.F.R. 1610.5-3 provides in part:

Conformity and implementation.

(a) All future resource management authorizations and actions, as well as budget or other action proposals to higher levels in the Bureau of Land Management and Department, and subsequent more detailed or specific planning, shall conform to the approved plan.

(b) After a plan is approved or amended, and if otherwise authorized by law, regulation, contract, permit, cooperative agreement or other instrument of occupancy and use, the District and Area Manager shall take appropriate measures, subject to valid existing rights, to make operations and activities under existing permits, contracts, cooperative agreements or other instruments for occupancy and use, conform to the approved plan or amendment within a reasonable period of time. Any person adversely affected by a specific action being proposed to implement some portion of a resource management plan or amendment may appeal such action pursuant to 43 CFR 4.400 at the time the action is proposed for implementation.

(c) If a proposed action is not in conformance, and warrants further consideration before a plan revision is scheduled, such consideration shall be through a plan amendment in accordance with the provisions of §1610.5-5 of this title.

* * * * *

Supreme Court, U.S.
FILED
JAN 5 - 2004
OFFICE OF THE CLERK

No. 03-101

In The Supreme Court of the United States

GALE NORTON, SECRETARY,
DEPT. OF INTERIOR, et al.,

Petitioners,

v.

SOUTHERN UTAH WILDERNESS ALLIANCE, et al.,

and

UTAH SHARED ACCESS ALLIANCE, et al.,

and

STATE OF UTAH, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF FOR RESPONDENTS UTAH SHARED ACCESS ALLIANCE, ET AL.

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QUESTION PRESENTED

Whether a complainant can elect to bring an action against a federal agency under the Administrative Procedure Act, 5 U.S.C. § 706(1), to "compel agency action unlawfully withheld or unreasonably delayed" in situations where the agency has acted and continues to act on the legal duties in question.

PARTIES TO THE PROCEEDINGS

Pursuant to Supreme Court Rule 24.2, Respondents Utah Shared Access Alliance, et al., adopt Petitioners' identification of the parties, and note, by way of clarification, that there are three separate groups of Respondents who have taken distinct and often conflicting positions on the issues in this case. The first group of Respondents here (collectively "SUWA") were Plaintiffs in the District Court and Appellants in the Tenth Circuit:

1. Southern Utah Wilderness Alliance;
2. The Wilderness Society;
3. Sierra Club;
4. Great Old Broads for Wilderness;
5. Wildlands CPR;
6. Utah Council of Trout Unlimited;
7. American Lands Alliance; and
8. Friends of the Abajos.

The second group of Respondents here (collectively "USA-All") were Defendant-Intervenors in the District Court, Appellees in the Tenth Circuit, and Petitioners before this Court in No. 02-1703:

1. Utah Shared Access Alliance;
2. BlueRibbon Coalition;
3. Elite Motorcycle Tours; and
4. Anthony Chatterly.

PARTIES TO THE PROCEEDINGS – Continued

Pursuant to Supreme Court Rule 29.6, Respondents Utah Shared Access Alliance, BlueRibbon Coalition and Elite Motorcycle Tours hereby disclose that they are nongovernmental corporations, but do not have any publicly issued shares and further disclose there is no parent or publicly held company owning 10% or more of the stock of any of these corporate Respondents.

The third group of Respondents here were Defendant-Intervenors in the District Court and Appellees in the Tenth Circuit:

1. State of Utah;
2. San Juan County, Utah;
3. Emery County, Utah;
4. Kane County, Utah;
5. Wayne County, Utah;
6. Utah School and Institutional Trust Lands Administration.

TABLE OF CONTENTS

	Page
Question Presented	i
Parties to the Proceedings	ii
Table of Authorities	v
Statement of the Case	1
Summary of Argument	9
Argument	10
A. The Tenth Circuit Decision Improperly Expands APA Section 706(1) Review and Allows Complainants to Bypass Review of Final Agency Action	10
B. The Tenth Circuit Approach Will Discourage and Nullify Participation in the Administrative Process	17
Conclusion	21

TABLE OF AUTHORITIES

Page

CASES

American Farm Bureau v. U.S. EPA, 121 F.Supp.2d 84 (D.D.C. 2000) 11

Atchison, Topeka & Santa Fe Railway Co. v. Wichita Bd. of Trade, 412 U.S. 800 (1973) 18

Bennett v. Spear, 520 U.S. 154 (1997) 10

Camp v. Pitts, 411 U.S. 138 (1973) 19

Ecology Center v. U.S. Forest Service, 192 F.3d 922 (9th Cir. 1999) 11

Friends of the Clearwater v. Dombeck, 222 F.3d 552 (9th Cir. 2000) 19

Glisson v. U.S. Forest Service, 55 F.3d 1325 (7th Cir. 1995) 17

Hall v. Baker, 867 F.2d 693 (D.C. Cir. 1989) 18

Lujan v. Nat'l Wildlife Federation, 497 U.S. 871 (1990) 10, 11, 12

McKart v. United States, 395 U.S. 185 (1969) 17, 18

Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Automobile Ins. Co., 463 U.S. 29 (1983) 10

Ohio Forestry Ass'n v. Sierra Club, 523 U.S. 726 (1998) 3, 13, 14

ONRC Action v. Bureau of Land Management, 150 F.3d 1132 (9th Cir. 1998) 11

Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941) 20

Public Citizen Health Research Group v. Comm'r, Food & Drug Admin., 740 F.2d 21 (D.C. Cir. 1984) 11

TABLE OF AUTHORITIES – Continued

Page

Public Citizen v. Nuclear Regulatory Comm'n, 845 F.2d 1105 (D.C. Cir. 1988) 12

Sierra Club v. Peterson, 228 F.3d 559 (5th Cir. 2000), *cert. denied*, 532 U.S. 1051 (2001) 11, 12

STATUTES AND REGULATIONS

5 U.S.C. § 702 ..... 5, 10

5 U.S.C. § 704 ..... 5, 10

5 U.S.C. § 706(1) ..... *passim*

5 U.S.C. § 706(2) ..... *passim*

5 U.S.C. § 706(2)(A) and (C) 13

43 U.S.C. § 1712 4

43 C.F.R. part 4 5

43 C.F.R. §§ 4.410-4.411 5

43 C.F.R. § 1601.0-5(k) 4

43 C.F.R. § 1610.2 4

43 C.F.R. § 1610.5-2 5

43 C.F.R. § 1610.5-5 4

43 C.F.R. § 1610.5-6 4

43 C.F.R. § 8340.0-5 ..... 1, 4

43 C.F.R. § 8341.2(a) 5

43 C.F.R. § 8342.1 ..... 4, 14

43 C.F.R. § 8342.2(a) 4

43 C.F.R. § 8364.1 5

43 C.F.R. § 8364.1(a) 5

TABLE OF AUTHORITIES – Continued

Page

MISCELLANEOUS

63 Fed.Reg. 110 (January 2, 1998) 6

65 Fed.Reg. 15169 (March 21, 2000) 14

65 Fed.Reg. 15169-15170 (March 21, 2000) 7

65 Fed.Reg. 19921 (April 13, 2000) 7

65 Fed.Reg. 52437 (August 29, 2000) 8

66 Fed.Reg. 55202 (November 1, 2001) 6

66 Fed.Reg. 56343-56344 (November 7, 2001) 6

66 Fed.Reg. 6659-6661 (January 22, 2001) 8

68 Fed.Reg. 33526 (June 4, 2003) 6

68 Fed.Reg. 33527 (June 4, 2003) 6

Supreme Court Rule 24.2 ii

Supreme Court Rule 29.6 iii

STATEMENT OF THE CASE

This case involves an effort to compel proper action by the Bureau of Land Management ("BLM") regulating off-road vehicle access in Utah.[1] Respondents USA-All support the position of Petitioners, have reviewed Petitioners' Statement in their Petition for Writ of Certiorari, and are likely to join in Petitioners' Statement in their merits brief. Since counsel has been unable to review that Statement but must submit a brief supporting Petitioners' position contemporaneously with the filing of Petitioners' brief, this Statement will avoid a complete description of the facts and proceedings below. Instead, this Statement will more fully describe the nature and extent of the agency activity addressing off-highway vehicle access to public lands in Utah.

1. On October 27, 1999, Plaintiffs-Respondents Southern Utah Wilderness Alliance, et al. ("SUWA") filed a complaint in the United States District Court for the District of Utah against the Secretary of the Department of Interior, the Bureau of Land Management ("BLM") and the Director of BLM, alleging that BLM had "'failed to perform its statutory and regulatory duties' by not preventing harmful environmental effects associated with off-road vehicle use" on BLM-managed federal lands. Pet. Ap. at 3a.

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[1] The term "off road vehicle" ("ORV") is used in BLM regulations and typically refers to motorized vehicles ranging from full size pickups, sport utility vehicles and jeeps to all-terrain vehicles to motorcycles, all "capable of, or designed for, travel on or immediately over land . . . or other natural terrain. . . ." 43 C.F.R. § 8340.0-5.

The complaint advanced ten (10) separate claims for relief, all seeking judicial review solely under section 10(e)(A) of the Administrative Procedure Act (the "APA"), codified at 5 U.S.C. § 706(1) ("APA section 706(1)"). Pet. Ap. at 3a. According to SUWA's theory, BLM was failing to take action in complete conformance with the Federal Land Policy and Management Act ("FLPMA") to prevent ORV "impairment" of Wilderness Study Areas, was failing to take sufficient action to implement certain provisions of applicable land management plans, and was failing to supplement certain environmental analyses regarding ORV use. *Ibid.* SUWA acknowledged that BLM had taken actions to address ORV management in the areas at issue, but characterized these efforts as "half steps" upon the applicable legal duties. See Pet. Ap. at 66a. SUWA therefore sought to "compel" BLM management action they believed to be "unlawfully withheld or unreasonably delayed."

The district court heard, and dismissed for lack of subject matter jurisdiction, claims brought through a motion for preliminary injunction.[2] SUWA's preliminary injunction focused on BLM ORV management at nine (9) discrete areas in Utah. Four (4) of the areas are WSAs, known as the Parunuweap WSA, Moquith Mountain WSA, Behind the Rocks WSA, and Sids Mountain WSA. Pet. Ap. at 61a. At these areas SUWA argued BLM was failing to sufficiently act on FLPMA's "nonimpairment" mandate, and further argued the agency was "failing to consistently

[2] Respondents USA-All filed the only motion to dismiss SUWA's claims, which was generally supported but not joined by BLM below. See Pet. Ap. at 57a.

implement the terms of its land use management plans" and was failing to act in accordance with BLM's general ORV management regulations. *Ibid.*

The other areas at issue were "Section 202 areas," including "lands adjacent to the Parunuweap, Behind the Rocks, and Indian Creek WSAs, as well as areas around Factory Butte, North Caineville Reef, and Wildhorse Mesa." Pet. Ap. at 71a. At these areas SUWA argued BLM was failing to act in accordance with its land use plans, BLM's general vehicle planning regulations, and regulations addressing a duty to supplement existing National Environmental Policy Act analyses. *Id.* at 72a.

2. The agency here has acted and continues to act on its legal duties to monitor and regulate vehicle access on BLM-managed lands. These actions occur on various levels in the tiered administrative planning process.[3] In general terms, such actions can occur through broad-scale "program level" planning, as well as more narrow and focused sites/issues through separate "project level" planning. See generally *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 729-730 (1998) (discussing relationship between program level and project level planning for U.S. Forest Service). BLM follows an analogous process, since Congress, through FLPMA, has directed BLM to prepare "land use

[3] Neither the Tenth Circuit nor District Court decisions present a detailed description of BLM's management actions. The Tenth Circuit decision generally summarizes some of the actions, but does not address the legal basis for, and significance of, these final agency actions, but instead focuses on the implementation aspects of the various orders, such as signing and visitor education efforts. Pet. Ap. at 19a n.11.

plans" which BLM refers to as resource management plans ("RMPs"). 43 U.S.C. § 1712; 43 C.F.R. § 1601.0-5(k). An RMP is a written document outlining broad goals and directives, such as "allowable resource uses," "resource condition goals and objectives to be attained," "need for an area to be covered by more detailed and specific plans," and "intervals and standards for monitoring and evaluating the plan. . . . " *Ibid.* The public "shall be provided opportunities to meaningfully participate in and comment on . . . " RMP development, and RMPs are generated only after circulation of an environmental impact statement and other procedures as required by the National Environmental Policy Act. 43 C.F.R. § 1610.2.

BLM is also authorized and directed to more specifically address off-road vehicle planning, including project level planning. BLM "shall designate all public lands as either open, limited or closed to off-road vehicles." 43 C.F.R. § 8342.1. Such designations are to be based on specified criteria, including the minimization of impacts "to soil, watershed, vegetation, air, or other resources of the public lands, and to prevent impairment of wilderness suitability." *Id.* at (a). This designation occurs through the RMP planning process, but can be reconsidered or more specifically addressed through the ongoing process of revising or amending the applicable RMP. 43 C.F.R. § 8342.2(a); 43 C.F.R. § 1610.5-5 (amendment); 43 C.F.R. § 1610.5-6 (revision). Thus, BLM conducts an open and forward-looking planning process addressing vehicle access "in a manner that provides an opportunity for the public to express itself and have its views given consideration." 43 C.F.R. § 8342.2(a).

In specified circumstances, BLM may also take more immediate action to regulate vehicle access. Upon a

finding that "off-road vehicles are causing or will cause considerable adverse effects upon soil, vegetation, wildlife, wildlife habitat, cultural resources, historical resources, threatened or endangered species, wilderness suitability, other authorized uses, or other resources . . . " the applicable BLM official "shall immediately close the areas affected to the type(s) of vehicle causing the adverse effect until the adverse effects are eliminated and measures implemented to prevent recurrence." 43 C.F.R. § 8341.2(a). Such orders may be issued outside the public planning process, although the presence of such an "emergency" order does not prevent further analysis through further public planning. *Ibid.* BLM is also authorized to issue "closure and restriction orders" as necessary "[t]o protect persons, property, and public lands and resources. . . . " 43 C.F.R. § 8364.1(a). The applicable regulation states only that such orders be posted at specified places and published in the Federal Register, but does not clarify how such orders relate to the ongoing planning process or the "emergency" orders authorized under section 8341.2(a). 43 C.F.R. § 8364.1.

Aggrieved participants in any BLM planning process have the option of pursuing administrative review of the agency's decision. For RMPs, participants in the planning process can file a protest which will ultimately be decided by the Director of BLM. 43 C.F.R. § 1610.5-2. Other decisions, such as those adopting vehicle designation plans, are typically subject to protest and/or administrative appeal. 43 C.F.R. §§ 4.410-4.411 (describing decisions subject to appeal); 43 C.F.R. part 4, subpart B (prescribing general rules for BLM appeals). Those dissatisfied by the results of such administrative review may pursue judicial review under the APA. 5 U.S.C. §§ 702, 704.

BLM has previously issued RMPs or equivalent land use plans for all the areas at issue in this action, and is in the process of revising those plans. For instance, the agency published notice of intent to RMP revisions for the Moab and Monticello Field Offices, which manage a total of about 2.46 million acres of public lands, including many lands addressed by this action. 68 Fed.Reg. 33526 (June 4, 2003); http://www.moabrmp.com. Numerous public meetings and opportunities for input will occur during this process, which will consider BLM direction for virtually all management issues, including "access to and transportation on the public lands." 68 Fed.Reg. 33527 (June 4, 2003). The Price Field Office has issued a similar notice, indicating it is generating an RMP for the approximately 2.5 million acres of lands it manages. 66 Fed.Reg. 56343-56344 (November 7, 2001); http://www.pricermp.com. The same is true of the Richfield Field Office, whose RMP will address approximately 2.2 million acres of BLM-managed lands. 66 Fed.Reg. 55202 (November 1, 2001); http://www.richfieldrmp.com. Thus, interested members of the public, including all Respondents in this case, can actively participate in the ongoing planning process in the hopes of influencing BLM's programmatic management direction for the lands at issue here.

BLM has also issued numerous project level decisions affecting vehicle access to specific areas targeted in SUWA's preliminary injunction motion. Prior to the filing of this action, BLM issued vehicle and camping restrictions in the Indian Creek Canyon Corridor. In part, these restrictions limited all motor vehicle and mountain bike travel to "existing roads and trails." 63 Fed.Reg. 110 (January 2, 1998). During the early stages of the case, the Price Field Office issued a "temporary emergency closure"

addressing all seven (7) WSAs within its jurisdiction. 65 Fed.Reg. 15169-15170 (March 21, 2000). This order completely prohibited vehicle access within six of the seven areas, and limited vehicle travel in the remaining Sids Mountain WSA to four (4) designated routes. *Id.* at 15170. The Federal Register notice partially describes the basis for this order, stating "[t]he impairment of wilderness values necessitates this emergency closure order in the seven WSAs. . . . " *Ibid.*; see also Tr. at 134-165 (district court testimony of Price Field Office Manager describing decision and implementation efforts). To aid implementation and enforcement efforts, BLM, with the assistance of varied local interest groups, installed "about 266 signs, . . . 19 barricades comprised of 97 segments of buck and pole fence to the tune of about 2000 feet and 12 kiosks or information bulletin boards that have been placed . . . " in the Sids Mountain WSA. Tr. at 676.

The BLM Kanab Field Office conducted a public planning process over several years which ultimately led to adoption of a land use plan amendment covering the Moquith Mountain area, including the Coral Pink Sand Dunes. 65 Fed.Reg. 19921 (April 13, 2000). This decision, adopted following an environmental assessment and finding of no significant impact in accordance with the National Environmental Policy Act, addressed a variety of issues including sensitive species and vehicle management. *Ibid.*; see also Tr. at 387-403 (testimony of planning team leader describing planning process). As a result of this decision, "[o]ver 95 percent of the WSA is closed to [ORV] use." *Id.* at 407. The Kanab Field Office subsequently issued additional "temporary emergency [ORV] travel limitations" restricting travel within three (3) WSAs "to only those travel routes and ways identified during the

original wilderness inventory completed in 1980 and shown on the inventory maps. . . . " 65 Fed.Reg. 52437 (August 29, 2000).

The BLM Moab Field Office has completed similar management efforts. Through either the applicable RMP or through additional closure orders, travel within the Behind the Rocks WSA "is limited to the inventoried ways that were part of the WSA inventory." Tr. at 37. Like other offices, the Moab office conducts ongoing monitoring and on-the-ground implementation efforts. Tr. at 218-237. The Moab Office also issued an extensive "interim" restriction order revising previous "open" travel designations and requiring travel to be limited to existing roads and trails on approximately 245,642 acres, and implementing closures to vehicle access at other specified locations. 66 Fed.Reg. 6659-6661 (January 22, 2001).

In at least some instances, BLM has revisited the "temporary" restrictions outlined above and has addressed vehicle access issues through a more thorough public planning process. For example, the Price Field Office has completed the San Rafael Route Designation Plan, which analyzed vehicle access issues throughout the Price Field Office, including the seven WSAs covered by the March, 2000, closure order. BLM Decision Summary, http://www.ut.blm.gov/sanrafaelorv.wthedecision.htm. This decision authorizes continued ORV travel along 677 miles of "secondary [ORV] routes" while closing 468 miles of routes to vehicle access. *Ibid.* The Route Designation Plan reanalyzed and left in place the March, 2000, management scheme for the Price Field Office WSAs. *Ibid.*

As is the case with most agency decisions, BLM's have been anything but universally accepted. However, at least

in BLM's assessment, the management actions have prevented impairment and allowed the WSAs to retain whatever wilderness values they possessed upon designation. See, e.g., Tr. at 47-48 (estimating impacts to Behind the Rocks WSA "to equate to about a 2/100 of a percent of the overall area" and concluding this level of impact is "insignificant in terms of the ability to designate it as wilderness."). BLM has certainly taken action to manage vehicle access, and will continue to do so during and beyond this litigation.

SUMMARY OF ARGUMENT

The Tenth Circuit's holding would significantly expand APA section 706(1) jurisdiction. The Tenth Circuit majority's new jurisdictional analysis will have dramatic practical consequences for all involved in the use and management of the lands in question. The consequences of this new relationship between administrative agencies, courts and the public will potentially extend beyond the specific context of this case into any relationships defined by the APA. This Court should reject the Tenth Circuit majority's approach and confine APA section 706(1) review to the appropriate situations where the agency has genuinely failed to act on plainly-prescribed legal duties.

ARGUMENT

A. The Tenth Circuit Decision Improperly Expands APA Section 706(1) Review and Allows Complainants to Bypass Review of Final Agency Action.

The Tenth Circuit majority's decision would dramatically and unjustifiably expand APA section 706(1) review. Petitioners have properly noted many of the legal flaws in this approach. In particular, the Tenth Circuit majority's analysis of section 706(1) cannot be squared with this Court's guidance in *Lujan v. Nat'l Wildlife Federation*, 497 U.S. 871 (1990). *Lujan* does not specifically mention APA section 706(1), but counsels that judicial review under the APA proceeds according to a "case-by-case approach" which "is the traditional, and remains the normal, mode of operation of the courts." *Lujan*, 497 U.S. at 894.

1. The starting point in the jurisdictional analysis is whether the agency has taken "final agency action." *Lujan*, 497 U.S. at 882-883 (analyzing APA provisions at 5 U.S.C. §§ 702, 704 limiting judicial review to "final agency action" presented by a party "suffering legal wrong" or "adversely affected or aggrieved by agency action within the meaning of a relevant statute . . . "). "Final agency action" occurs when the action "mark[s] the 'consummation' of the agency's decisionmaking process" and when the action is "one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow'. . . . " *Bennett v. Spear*, 520 U.S. 154, 177-178 (1997) (citations omitted). Where a claimant properly challenges final agency action, the reviewing court will analyze the claim under the "arbitrary and capricious" review standard. 5 U.S.C. § 706(2); *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 43 (1983). Under this

approach, the judiciary "intervene[s] in the administration of the laws only when, and to the extent that, a specific 'final agency action' has an actual or immediately threatened effect." *Lujan*, 497 U.S. at 894.

The parallels between the *Lujan* analysis of the "final agency action" requirement and section 706(1) review have been noted by many courts, for *Lujan* is frequently discussed in cases considering the availability of section 706(1) review. See, e.g., *Sierra Club v. Peterson*, 228 F.3d 559, 566-567 (5th Cir. 2000), *cert. denied*, 532 U.S. 1051 (2001); *ONRC Action v. Bureau of Land Management*, 150 F.3d 1132, 1135-1136 (9th Cir. 1998); *American Farm Bureau v. U.S. EPA*, 121 F.Supp.2d 84, 102-103 (D.D.C. 2000). These decisions reject efforts like SUWA's as attempting the flawed strategy of "challeng[ing] an entire program by simply identifying specific allegedly-improper final agency actions within that program. . . . " *Peterson*, 228 F.3d at 567.

2. The Tenth Circuit majority's reasoning also fails to recognize the jurisdictional significance of BLM's actions on the relevant legal duties. The section 706(1) cause of action exists in large part to prevent an agency from avoiding review entirely by failing to do anything, for "[w]hen agency recalcitrance is in the face of clear statutory duty or is of such a magnitude that it amounts to an abdication of statutory responsibility, the court has the power to order the agency to carry out its substantive statutory mandates." *Public Citizen Health Research Group v. Comm'r, Food & Drug Admin.*, 740 F.2d 21, 32 (D.C. Cir. 1984). A proper section 706(1) claim must identify "a genuine failure to act" as opposed to "complaints about the sufficiency of an agency action 'dressed up as an agency's failure to act.'" *Ecology Center v. U.S.*

Forest Service, 192 F.3d 922, 926 (9th Cir. 1999) (quoting *Nevada v. Watkins*, 939 F.2d 710, 714 n.11 (9th Cir. 1991)); see also *Public Citizen v. Nuclear Regulatory Comm'n*, 845 F.2d 1105, 1108 (D.C. Cir. 1988) ("Almost any objection to an agency action can be dressed up as an agency's failure to act."). Similarly, in a characterization closely tracking the District Court's reasoning in this case, the *Peterson* en banc majority rejected the failure to act claim before it, observing "the Forest Service has been acting, but the environmental groups simply do not believe its actions have complied with the [National Forest Management Act]." *Peterson*, 228 F.3d at 568. Noting the "concern that finding no final agency action here 'would put all of the Forest Service's on-the-ground violations ... beyond review'" the Fifth Circuit majority noted that *Lujan* and other cases direct claimants to "challenge discrete site-specific sales allowed by the Forest Service." *Ibid.*

The Tenth Circuit majority failed to properly understand and apply these principles. The weakness of the Tenth Circuit majority's reasoning is epitomized by footnote twelve of its opinion. Footnote twelve presents a hypothetical in which Congress prohibited all logging in a national forest, but the agency took action to prohibit logging in only half the forest, while allowing logging in the other half. Pet. Ap. at 20a n.12. The majority reasons that this hypothetical demonstrates the illogic of allowing section 706(1) jurisdiction to turn on the mere existence of "partial" agency action, which in the hypothetical is compared to the agency's compliance with only "half" of the applicable legal direction. *Ibid.*

Footnote twelve is flawed on several levels and ignores basic tenets of APA jurisdiction. The choice of a logging-oriented hypothetical is ironic, for in that specific

context this Court has noted that actual on-the-ground activity cannot occur absent both program- and project-level agency decisions affirmatively authorizing the activity. *Ohio Forestry*, 523 U.S. at 729-730. *Ohio Forestry* summarized the second step as having five (5) distinct components, the last of which is the right to challenge the agency decision "in an administrative appeals process and in court." *Id.* at 730. Certainly the existence of the hypothetical legal directive to prohibit logging could be a central component of such an attack on either the program level or project level decision, for one might reasonably, if not persuasively, argue that an agency decision to proceed with activity prohibited by Congress would constitute "agency action ... not in accordance with law" or "in excess of statutory jurisdiction, authority, or limitations.... 5 U.S.C. § 706(2)(A) and (C). Thus, a proper party has ample opportunity to challenge the hypothetical agency decision at issue, but such challenge should, and must, proceed via APA section 706(2). The Tenth Circuit majority ignored the availability of section 706(2) review in erroneously concluding that 706(1) review should be available to plaintiffs creative enough to characterize agency action as mere "half steps" to some broad statutory goal.

SUWA counters these jurisdictional limits on section 706(1) with unfounded fears they will create a jurisdictional vacuum. Specifically, SUWA claims it cannot bring its "nonimpairment" claims in a challenge to BLM's alleged management "half steps" because SUWA's "case challenges BLM's failure to impose just such restrictions." Brief in Op. to Pet. at 17 n.9. This argument is incorrect. All vehicle access on BLM lands flows from some affirmative agency decision. Even at the broadest programmatic

level, BLM must designate areas as "either open, limited or closed to off-road vehicles." 43 C.F.R. § 8342.1. *Ohio Forestry* offers guidance here. In particular, a program level decision to allow, or prohibit, activity which allegedly has immediate concrete effect on a party can form the basis for administrative and judicial review. *Ohio Forestry*, 523 U.S. at 738-739 (discussing Solicitor General's concession at argument that land use plan decision to close an area to vehicle use, or to "allow[ ] motorcycles into a bird-watching area or something that like, that would be immediately justiciable"). In a decision like an RMP, BLM must consider and apply the nonimpairment mandate and numerous other applicable statutes, in determining whether to allow, prohibit, or limit vehicle access throughout the *entire* planning area. An aggrieved party advocating or opposing vehicle access could challenge the agency's decision on any acre of the planning area, but such review must proceed under APA section 706(2).

Interested parties have even clearer opportunities for review when the agency takes project level action. SUWA's ability to challenge BLM's "nonimpairment" decisions is aptly demonstrated by BLM's actions addressing WSAs in the Price Field Office. On March 21, 2001, BLM issued a "temporary emergency closure" affecting all seven (7) WSAs administered by that office. 65 Fed.Reg. 15169 (March 21, 2000). This action prohibited all vehicle access to six (6) of the seven areas, and limited vehicle travel in the remaining area to four (4) designated routes "on a conditional basis ... contingent upon the success of a

rehabilitation and monitoring plan.... " *Id.* at 15170.[4] Certainly SUWA could have challenged the decision to allow access to continue on the four routes, just as USA-All could have challenged the decision to eliminate access in the remainder of the WSAs. Such challenges would proceed under APA section 706(2) and would focus on the agency record and the manner in which the agency reached and articulated the basis for its decision. SUWA is well aware of this option, having previously prosecuted, and succeeded upon, an administrative appeal to a similar BLM decision affecting the Moquith Mountain WSA. *Southern Utah Wilderness Alliance*, 142 IBLA 164 (1998). That appeal contains legal claims virtually identical to those presented in this case, for in the Moquith Mountain appeal "[w]hile [SUWA] concedes that the BLM Management Schedule 'offers some small steps in the right direction,' ([appeal Statement of Reasons] at 6), it challenges those aspects of the Decision which permit *any* continued ORV use in the WSA, in the face of what it claims to be ongoing impairment to the wilderness values in the area." *Id.* at 169 (emphasis added). One dissatisfied with the outcome of the administrative review process could seek judicial review as outlined in the APA and *Lujan*. SUWA can, and has, challenged BLM's decision to allow vehicle

[4] This "temporary emergency closure" has been continued by further final agency action in the form of the Price Field Office's San Rafael Route Designation Plan, which, aside from the WSA restrictions, allows travel to continue on 677 miles of "secondary OHV routes" while closing 468 miles of other routes. BLM Decision Summary, http://www.ut.blm.gov/sanrafaelohv/wthedecision.htm. SUWA is well aware of this Decision, as well as its right to challenge the same via administrative appeal. Brief in Op. to Pet. at 19 and n.12.

access to continue, just as logging opponents could challenge the agency's decision to allow logging on the "other half" of the Tenth Circuit majority's hypothetical forest. There exists jurisdiction under APA section 706(2) for such claims to proceed.

Participants in the kaleidoscopic public lands debate have ample opportunity to challenge agency decisions affecting their varied interests. Until now, such challenges proceeded under APA section 706(2), in which a reviewing court focused on the administrative record before the agency and the agency's ability to articulate the basis for its decision, with due deference accorded administrative discretion and expertise. APA section 706(1) was generally understood to parallel mandamus review in the context of the APA, and was utilized in the rare instance when an agency utterly failed to take any action where it lacked discretion as to whether action was required or failed to act on a plainly prescribed legal duty. The Tenth Circuit majority's approach here would dramatically alter this view, and would allow creative plaintiffs to "dress up" a challenge to the sufficiency of any agency action as the agency's "failure to act." This result would allow litigants to effectively bypass the "arbitrary and capricious" review of APA section 706(2) in the hopes that a single district court judge might be more sympathetic to the claim that the agency had "unreasonably delayed" complete compliance with some statutory directive. This Court should reject this shift, and clarify that when an agency takes action to implement its statutory duties, as BLM did here, APA section 706(2) presents the sole method by which an aggrieved party can challenge the agency's decision.

B. The Tenth Circuit Approach Will Discourage and Nullify Participation in the Administrative Process.

The obvious consequence of the Tenth Circuit majority's new rule will be to encourage more frequent and even more creative use of APA section 706(1) by special interests seeking to influence the management balance sought by administrative agencies.

The modern administrative state depends on the premise that agencies will be delegated meaningful authority within the realm of their specialized expertise. In order to exercise that authority, agencies must promulgate and apply procedures and regulations designed to ensure appropriate involvement of the regulated parties in administrative decisionmaking. Courts evaluating actions under the APA regularly consider the nature of the administrative process. While such discussion often occurs when applying the doctrine of exhaustion of administrative remedies, it is relevant here in describing the proper role of the administrative process. Many of the related jurisdictional doctrines such as finality, ripeness, mootness and exhaustion reflect the need to respect the administrative process and to "postpone judicial intervention until the plaintiff's need for judicial help is clear and the record is adequate to enable the intelligent performance of the judicial function." *Glisson v. U.S. Forest Service*, 55 F.3d 1325, 1327 (7th Cir. 1995). Agencies should be provided some latitude to perform their delegated functions, "[a]nd since agency decisions are frequently of a discretionary nature or frequently require expertise, the agency should be given the first chance to exercise that discretion or to apply that expertise." *McKart v. United States*, 395 U.S. 185, 194 (1969). Particularly in such instances "[t]he

courts ordinarily should not interfere with an agency until it has completed its action, or else has clearly exceeded its jurisdiction." *Ibid.*

It is generally proper to confine judicial review to final agency decisions, for courts "must rely on the rationale adopted by the agency if we are to guarantee the integrity of the administrative process. Only in that way may we 'guard against the danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy.'" *Atchison, Topeka & Santa Fe Railway Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 807 (1973) (citations omitted, quoting *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941)). Withholding premature review helps maintain the proper relationship between the courts and agencies, as "notions of administrative autonomy require that the agency be given a chance to discover and correct its own errors." *McKart*, 395 U.S. at 195. Unjustified judicial review through "frequent and deliberate flouting of administrative processes could weaken the effectiveness of an agency by encouraging people to ignore its procedures." *Ibid.*

For agencies like BLM which regulate and regularly interact with the general public, it is critical to maintain an open and respectful dialogue regarding the agency's conduct and rationale for any restrictions on the public. Agency decisions must be carefully disclosed and discussed in a public planning process, because "it is also a familiar (and fundamental) tenet of administrative law that '[t]he failure to admit or explain . . . a basic change in the interpretation of a statutory standard to be applied to conduct of the public undermines the integrity of the administrative process.'" *Hall v. Baker*, 867 F.2d 693, 696

(D.C. Cir. 1989) (quoting *Hatch v. Federal Energy Regulatory Comm'n*, 654 F.2d 825, 835 (D.C. Cir. 1981)) (bracketing and elipses in *Hall*).

The Tenth Circuit majority's jurisdictional rule reflects or promotes these evils. As a section 706(1) claim ostensibly challenges the agency's failure to act, some courts have held "review is not limited to the record as it existed at any single point in time, because there is no final agency action to demarcate the limits of the record." *Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 560 (9th Cir. 2000). This situation effectively diminishes the level of deference accorded agency determinations, while allowing plaintiffs to freely submit evidence that might be excluded in section 706(2) review confined to the record before the agency at the time of the decision. See *Camp v. Pitts*, 411 U.S. 138, 142-143 (1973). The difficulty and inefficiency of this approach is reflected here, where the District Court spent a total of six days in evidentiary hearings creating "the record" on SUWA's preliminary injunction motion. See Pet. Ap. at 65a (explaining District Court received testimony "during a two-day hearing on Plaintiffs' motion for temporary restraining order and during a four-day preliminary injunction hearing. . . . "). Such an approach requires investment of substantial resources by the court and the participants, and presents the risk of awkward overlap between judicial and administrative functions in compiling and reviewing plaintiffs' formulation of a "record" of the selected inaction for the first time in the district court.

Of even greater concern is the potential that such procedures invite judicial intrusion into ongoing administrative processes. Supposedly a section 706(1) claim could

do no more than "compel" the agency to exercise its discretion on the ignored legal duty, but here SUWA invites the court to close areas to vehicle access in response to BLM's alleged "failure to act" on the nonimpairment mandate. This situation presents a clear risk that a single district court judge might "slid[e] unconsciously from the narrow confines of law into the more spacious domain of policy." *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941).

Finally, from the perspective of regulated parties and the public, the Tenth Circuit majority's rule leaves little incentive to participate fully, if at all, in the administrative process. Instead, interested parties might continually threaten and bring section 706(1) claims in the hope of gaining leverage or badgering the agency into management changes outside the administrative process. Those diligently attending public meetings and submitting comments to the agency's proposed decisions will likely see their input overshadowed by closed door negotiations between the agency and special interests brandishing broad section 706(1) claims. Under the new rule, the administrative process will at best be a symbolic exercise where interested parties participate to the minimum extent necessary to satisfy any jurisdictional prerequisites to further review, while focusing their efforts on the dialogue occurring outside the formal public process. Such a result warps fundamental principles of administrative law.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

GAIL NORTON, Secretary of the Interior, *et al.*,
Petitioners,

v.

SOUTHERN UTAH WILDERNESS ALLIANCE, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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QUESTIONS PRESENTED

1. Whether the district court had authority under the Administrative Procedure Act, 5 U.S.C. § 706, to consider a claim that BLM failed to satisfy its mandatory duty to prevent the impairment of four specific wilderness study areas.

2. Whether the district court had authority under the Administrative Procedure Act, 5 U.S.C. § 706, to consider a claim that BLM failed to comply with its mandatory duty to "manage the public lands ... in accordance with ... land use plans," when it was undisputed that the agency had not taken the two land use plan actions at issue.

3. Whether the district court had authority under the Administrative Procedure Act, 5 U.S.C. § 706, to consider a claim that BLM violated the National Environmental Policy Act by failing to determine whether significant increases in off-road vehicle use on specified BLM lands in Utah required supplemental environmental analysis.

RULE 29.6 STATEMENT AND PARTIES TO THE PROCEEDINGS

The parties to these proceedings are listed on page II of Petitioners' Brief. This brief is submitted on behalf of the following Respondents:

Southern Utah Wilderness Alliance
The Wilderness Society
The Sierra Club
The Great Old Broads for Wilderness
Wildlands CPR
Utah Council of Trout Unlimited
American Lands Alliance
The Friends of the Abajos

These Respondents have no parent companies and issue no corporate stock.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

RULE 29.6 STATEMENT AND PARTIES TO THE PROCEEDINGS ii

TABLE OF AUTHORITIES vi

STATEMENT 1

I. Statutory and Regulatory Framework 1

A. FLPMA's Non-Impairment Mandate. 1

B. FLPMA's Land Use Planning Process 3

C. NEPA and the Supplemental Analysis Requirement 4

II. The Escalating ORV Crisis and BLM's Failure to Act 6

III. Procedural History. 8

A. District Court Proceedings 8

B. The Tenth Circuit's Decision. 10

C. BLM's Post-Complaint Actions. 11

SUMMARY OF ARGUMENT 13

ARGUMENT 16

I. Section 706(1) Provides a Remedy for BLM's Inaction Violating FLPMA's Non-Impairment Mandate. 16

A. The Language, Structure, and Purpose of the APA Plainly Provide for Review Here. 16

B. For § 706(1) Review, the Agency's Failure to Act Must Be Final – Regardless Whether the Action to Be Compelled Would Also Be Final 19

TABLE OF CONTENTS - continued

1. The APA's Text, Decades of Well-Established Law, and Pre-APA Mandamus Practice All Demonstrate That the Finality Requirement Applies to the Agency's Inaction. 19

2. BLM's Inaction Is "Final" Because It Is Sufficiently Consequential and Definitive. 23

C. Section 706(1) Provides a Remedy to Enforce a Mandatory Duty Even Where the Agency Has Discretion Concerning *How* to Comply. 27

1. Relief Under § 706(1) Depends on Whether a Duty Is Mandatory, Not on Its Specificity. 27

2. Pre-APA Mandamus Practice Confirms That Courts Can Compel Compliance with Duties That Afford Room for Discretion. 30

D. That BLM Took Some Action – Short of Final Affirmative Agency Action – Did Not Render Its Failure to Act Unreviewable 32

1. Section 706(1) Applies to Partial Inaction. 32

2. BLM's Post-Complaint Actions Do Not Moot SUWA's Claims, Nor Would Mootness Support BLM's Sweeping Position on Reviewability 34

E. Enforcement of the Non-Impairment Duty Does Not Interfere with BLM's "Day-to-Day" Activities 35

1. The APA Appropriately Limits Judicial Review 35

2. The Intrusions Imagined by BLM Are Illusory. 36

TABLE OF CONTENTS - continued

3. Notwithstanding BLM's Rhetoric, the Court's Decision in *Lujan* Supports Review. 39

II. Actions Required by Land Use Plans Are Enforceable Under § 706(1). 40

A. Under FLPMA, BLM Has a Mandatory Duty to Carry Out Actions Required by LUPs. 41

B. LUPs Are Not the Purely Programmatic, Voluntary, and Contingent Documents BLM Claims. 43

C. BLM's Failures to Act as Required by the LUPs Were Final When This Case Was Filed. 45

III. BLM's NEPA Duty To Take a "Hard Look" at Whether It Must Prepare an SEIS Is Enforceable Under § 706(1). 46

CONCLUSION 50

TABLE OF AUTHORITIES

CASES Page

Abbott Laboratories v. Gardner, 387 U.S. 136 (1967) .. 17, 23, 38

Action on Smoking & Health v. Department of Labor, 28 F.3d 162 (D.C. Cir. 1994) 21

Adams v. Richardson, 480 F.2d 1159 (D.C. Cir. 1973) 26

America Iron & Steel Institute v. EPA, 115 F.3d 979 (D.C. Cir. 1997) 34

Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150 (1970) 17

In re Barr Laboratories, Inc., 930 F.2d 72 (D.C. Cir. 1991) 39

Bennett v. Spear, 520 U.S. 154 (1997) 17, 23, 49

In re Bluewater Network, 234 F.3d 1305 (D.C. Cir. 2000) 32

Brock v. Pierce County, 476 U.S. 253 (1986) 24

Caswell v. Califano, 583 F.2d 9 (1st Cir. 1978) 26

In re Center for Auto Safety, 793 F.2d 1346 (D.C. Cir. 1986) 24, 34

Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971) 17

Cobell v. Norton, 240 F.3d 1081 (D.C. Cir. 2001) 21, 25, 26, 28, 32, 38, 39

Cobell v. Norton, 334 F.3d 1128 (D.C. Cir. 2003) 39

Colorado Environmental Coalition v. Dombeck, 185 F.3d 1162 (10th Cir. 1999) 50

TABLE OF AUTHORITIES - continued

Costle v. Pacific Legal Foundation, 445 U.S. 198 (1980) 20

Cutler v. Hayes, 818 F.2d 879 (D.C. Cir. 1987) .....

Darby v. Cisneros, 509 U.S. 137 (1993) 30, 36

Deering Milliken, Inc. v. Johnston, 295 F.2d 856 (4th Cir. 1961) 21

Dickinson v. Zurko, 527 U.S. 150 (1999) 32

Environmental Defense Fund, Inc. v. Hardin, 428 F.2d 1093 (D.C. Cir. 1970) 25

Environmental Defense Fund, Inc. v. Ruckelshaus, 439 F.2d 584 (D.C. Cir. 1971) 25

FTC v. Standard Oil Co., 449 U.S. 232 (1980) 16, 18

Firebaugh Canal Co. v. United States, 203 F.3d 568 (9th Cir. 2000) 26

Forest Guardians v. Babbitt, 174 F.3d 1178 (10th Cir. 1999) 24

Fox Television Stations, Inc. v. FCC, 280 F.3d 1027 (D.C. Cir. 2002), *modified on reh'g*, 293 F.3d 537 (D.C. Cir. 2002) 36

Franklin v. Massachusetts, 505 U.S. 788 (1992) 23

Frew ex rel. Frew v. Hawkins, 124 S. Ct. 899 (2004) 38

Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc., 528 U.S. 167 (2000) 34, 35

Heckler v. Chaney, 470 U.S. 821 (1985) 15, 17, 36

Home Builders Ass'n of Greater Chicago v. United States Army Corps. of Engineers, 335 F.3d 607 (7th Cir. 2003) 22

TABLE OF AUTHORITIES - continued

Houseton v. Nimmo, 670 F.2d 1375 (9th Cir. 1982) 22

ICC v. New York, New Haven & Hartford Railroad Co., 287 U.S. 178 (1932) 22

ICC v. United States ex rel. Humboldt Steamship Co., 224 U.S. 474 (1912) 22, 30, 31

Interstate Natural Gas Ass'n of America v. FERC, 285 F.3d 18 (D.C. Cir. 2002) 26

Laguna Greenbelt, Inc. v. United States Department of Transportation, 42 F.3d 517 (9th Cir. 1994) 48, 50

Ligon Specialized Hauler, Inc. v. ICC, 587 F.2d 304 (6th Cir. 1978) 22

Lujan v. National Wildlife Federation, 497 U.S. 871 (1990) 39, 40

Marsh v. Oregon Natural Resources Council, 490 U.S. 360 (1989) 5, 6, 46, 47, 48, 49

Massachusetts v. Watt, 716 F.2d 946 (1st Cir. 1983) 50

Motor Vehicle Manufactures Ass'n of United States, Inc. v. State Farm Mutual Automobile Insurance Co., 463 U.S. 29 (1983) 44

Nader v. FCC, 520 F.2d 182 (D.C. Cir. 1975) 32

National Parks Conservation Ass'n v. Norton, 324 F.3d 1229 (11th Cir. 2003) 22, 24

Ohio Forestry Ass'n v. Sierra Club, 523 U.S. 726 (1998) 40, 43, 50

Public Citizen Health Research Group v. Commissioner, FDA, 740 F.2d 21 (D.C. Cir. 1984) 21

TABLE OF AUTHORITIES - continued

Robertson v. Methow Valley Citizens Council, 490 U.S. 332 (1989) 5, 47

Rocky Mountain Oil & Gas Ass'n v. Watt, 696 F.2d 734 (10th Cir. 1982) 3

Safeway Stores v. Brown, 138 F.2d 278 (Emer. Ct. App. 1943) 30

Shaughnessy v. Pedreiro, 349 U.S. 48 (1955) 17

Sierra Club v. Peterson, 228 F.3d 559 (5th Cir. 2000) 21-22, 40

Sierra Club v. Thomas, 828 F.2d 783 (D.C. Cir. 1987) 25, 26, 47, 50

Telecommunications Research & Action Center v. FCC, 750 F.2d 70 (D.C. Cir. 1984) 23, 26

Thompson v. United States Department of Labor, 813 F.2d 48 (3d Cir. 1987) 21

United States v. Los Angeles & Salt Lake Railroad Co., 273 U.S. 299 (1927) 22

Utah v. Babbitt, 137 F.3d 1193 (10th Cir. 1998) 3

Valona v. United States Parole Commission, 165 F.3d 508 (7th Cir. 1998) 16

Whitman v. America Trucking Ass'ns, 531 U.S. 457 (2001) 20

Work v. United States ex rel. Rives, 267 U.S. 175 (1925) 31, 32

Your Home Visiting Nurse Services, Inc. v. Shalala, 525 U.S. 449 (1999) 36

TABLE OF AUTHORITIES - continued

STATUTES AND REGULATIONS

5 U.S.C. § 551(13) 16, 18, 19, 20, 28, 32

5 U.S.C. § 555(b) 26, 29, 37

5 U.S.C. § 701(a) 18

5 U.S.C. § 701(a)(2) 29

5 U.S.C. § 702 ..... 13, 18, 22, 38, 39

5 U.S.C. § 704 ..... 18, 19, 20, 21, 37

5 U.S.C. § 706(1) ..... *passim*

5 U.S.C. § 706(2) ..... *passim*

16 U.S.C. § 1131(a) 1

16 U.S.C. § 1131(c) 1

16 U.S.C. § 1132(b) 2

16 U.S.C. § 1132(c) 2

42 U.S.C. § 4321 4

42 U.S.C. § 4332(2)(C) 5

43 U.S.C. § 1701(a)(2) 4

43 U.S.C. § 1701(a)(7) 4

43 U.S.C. § 1712 ..... 3, 4, 44

43 U.S.C. § 1712(f) 4

43 U.S.C. § 1732(a) 4, 40, 44

43 U.S.C. § 1782(a) 2

43 U.S.C. § 1782(c) 2, 17, 24

25 C.F.R. § 2.8 37

TABLE OF AUTHORITIES - continued

40 C.F.R. §§ 1500.1-1508.28 5
40 C.F.R. § 1502.9(c) 5, 46
43 C.F.R. § 1601.0-5(b) 41
43 C.F.R. § 1601.0-5(k) 4, 44
43 C.F.R. § 1601.0-2 41
43 C.F.R. § 1601.0-6 ..... 5, 49
43 C.F.R. § 1610.2 4
43 C.F.R. § 1610.5-2 4
43 C.F.R. § 1610.5-3(a) 4, 41
43 C.F.R. § 1610.5-4 ..... 4, 44
43 C.F.R. § 1610.5-5 ..... 4, 44
43 C.F.R. § 1610.5-6 ..... 4, 44
43 C.F.R. § 8340.0-7 44
43 C.F.R. § 8341.1(b) 44
43 C.F.R. § 8341.2 ..... 4, 11, 34
43 C.F.R. § 8342.1 4
43 C.F.R. § 8342.2 4
43 C.F.R. § 8342.2(a) 43
43 C.F.R. § 8342.2(b) 44
Exec. Order 11644, 37 Fed. Reg. 2877 (Feb. 8, 1972), *amended by* Exec. Order 11989, 42 Fed. Reg. 26959 (May 24, 1977) 4, 6, 43
Exec. Order 11989, 42 Fed. Reg. 26959 (May 24, 1977) 4, 43

TABLE OF AUTHORITIES - continued

44 Fed. Reg. 72,014 (Dec. 12, 1979) 3
65 Fed. Reg. 15,169 (Mar. 21, 2000) 12
65 Fed. Reg. 19,921 (Apr. 13, 2000) 12
65 Fed. Reg. 52,437 (Aug. 29, 2000) 12
66 Fed. Reg. 6659 (Jan. 22, 2001) 12

LEGISLATIVE MATERIALS

H.R. Rep. No. 88-1538 (1964), *reprinted in* 1964 U.S.C.C.A.N. 3615 2
H.R. Rep. No. 79-1980 (1946) 17, 18
S. Rep. No. 94-583 (1975) 4
S. Rep. No. 79-752 (1945) 17, 18
Senate Comm. on the Judiciary, 75th Cong., Administrative Procedure Act (Comm. Print 1945) 30

MISCELLANEOUS

BLM, *Utah Wilderness Questions & Answers*, http://www.ut.blm.gov/utahwilderness/q&as.htm 3
BLM, *1999 Utah Wilderness Inventory*, http://www.ut.blm.gov/utahwilderness/background.htm 3
BLM, *Questions and Answers*, http://www.blm.gov/nhp/news/releases/pages/2000/pr000110_ohv_qa.html 6

TABLE OF AUTHORITIES - continued

BLM, *National Management Strategy for Motorized Off-Highway Vehicle Use on Public Lands*, http://www.blm.gov/ohv/OHV_FNL.pdf 6

BLM, *San Rafael Route Designation Plan*, http://www.ut.blm.gov/sanrafaelohv/wtheplan.htm 12

Br. for the Pet'rs at 36-37, *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360 (1989) (No. 87-1704) 49

Peter H.A. Lehner, *Note, Judicial Review of Administrative Inaction*, 83 Colum. L. Rev. 627 (1983) 22

6 Op. Off. Legal Counsel 63 (1982) 2, 29

Peter L. Strauss et al., *Gellhorn & Byse's Administrative Law* (9th ed. 1995) 31

United States Dep't of Justice, *Attorney General's Manual on the Administrative Procedure Act* (1947) 22, 23, 30

BRIEF FOR RESPONDENTS

Under § 706(1) of the Administrative Procedure Act ("APA"), a court may compel an agency to comply with a mandatory statutory duty to act. Nothing in the language, structure, or history of the APA supports the novel limitations Petitioners (collectively, "BLM") would place on that authority. As the Tenth Circuit recognized, BLM seeks to carve out a "no-man's-land" of unlawful agency inaction that is permanently shielded from judicial review, even when the agency's failure to act causes direct and immediate injury to a legally protected interest – such as the irreversible destruction of some of our nation's few remaining wild lands. Contrary to BLM's arguments, enforcing a mandatory duty to act does not violate the APA's finality requirement or invade protected agency discretion. Nor – BLM's rhetoric notwithstanding – does this remedy intrude into "day-to-day," "ongoing," or "programmatic" agency activities. Established doctrines of administrative law prevent any undue judicial intrusion, *without* creating the no-man's-land of unreviewable and irreparable legal violations posited by BLM.

STATEMENT

I. Statutory and Regulatory Framework.

A. FLPMA's Non-Impairment Mandate.

Concerned about the rapid loss of our nation's last remaining wilderness, Congress enacted the Wilderness Act in 1964 "to assure that an increasing population . . . does not occupy and modify all areas within the United States . . . , leaving no lands designated for preservation and protection in their natural condition." 16 U.S.C. § 1131(a). The 1964 Act provides that "[a] wilderness . . . is hereby recognized as an area where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain." *Id.* § 1131(c). The Act instructed certain agencies to propose lands for wilderness status; Congress,

however, reserved for itself the sole prerogative to designate an area as "wilderness." *Id.* § 1132(b), (c); *see also* H.R. Rep. No. 88-1538, at 2-3 (1964), *reprinted in* 1964 U.S.C.C.A.N. 3615, 3616-17.

The 1964 Act's wilderness review provisions did not expressly cover the vast public lands under BLM's stewardship. Congress remedied that omission with the Federal Land Policy and Management Act of 1976 ("FLPMA"), which created a comprehensive framework for BLM land management. In FLPMA, Congress directed the Secretary of the Interior to identify BLM roadless areas "having wilderness characteristics," 43 U.S.C. § 1782(a), which are known as Wilderness Study Areas or WSAs. In order to safeguard Congress's statutory prerogative to designate any WSA as wilderness, FLPMA specifically requires BLM to manage WSAs to prevent impairment of their wilderness suitability until such time as Congress has acted:

> [U]ntil Congress has determined otherwise, the Secretary shall continue to manage [WSAs] . . . in a manner so as not to impair the suitability of such areas for preservation as wilderness.

Id. § 1782(c).

As a Department of Justice opinion explains, this provision "explicitly states how the land is to be managed in the interim between the beginning of the study period and the final decision, a period that may last for years." 6 Op. Off. Legal Counsel 63, 64 (1982) (opinion of Ass't Att'y Gen. Theodore Olson). The "provision would be frustrated by irreversible disturbances of the status quo" if the executive branch allowed impairment before final congressional action. *Id.* at 71. Thus, the executive branch lacks authority to disregard Congress's mandate. *Id.* at 63; *see also id.* at 71 ("One of the express congressional purposes for the FLPMA was to reassert Congress' control over federal lands . . .").

BLM gave further specificity to FLPMA's non-

impairment mandate in its binding Interim Management Policy ("IMP") for WSAs, adopted through notice-and-comment rulemaking. *See* CA10 App. 185-246; 44 Fed. Reg. 72,014 (Dec. 12, 1979); *Rocky Mountain Oil & Gas Ass'n v. Watt*, 696 F.2d 734, 739 n.6 (10th Cir. 1982).[1] BLM determined in the IMP that impairment is caused by "surface disturbance," or "any new disruption of the soil or vegetation requiring reclamation." CA10 App. 196. BLM also determined that cross-country use of off-road vehicles ("ORVs") is "surface disturbing because the tracks created by the vehicle[s] leave depressions or ruts, compact the soils, and trample or compress vegetation." *Id.*; *see also id.* at 234-35, 247-48.

Of 23 million acres of BLM lands in Utah, Congress has designated 0.6% as wilderness, while just over 14% have official WSA status.[2] In addition, BLM has identified an additional 2.6 million acres in Utah that would qualify for wilderness or WSA designation but were overlooked during BLM's earlier FLPMA wilderness reviews. These previously overlooked wild lands are commonly called "§ 202 areas," a reference to BLM's long-held view that such areas could be identified as WSAs through the land use planning process set forth in § 202 of FLPMA, 43 U.S.C. § 1712.[3]

B. FLPMA's Land Use Planning Process.

FLPMA also revolutionized the management of *all* BLM lands (not just WSAs) by requiring the agency to develop

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[1] BLM has revised the IMP several times, and has not followed notice-and-comment procedures for some of these revisions. Nevertheless, BLM's conclusions as to the activities that create impairment within the meaning of FLPMA have remained substantially the same since the IMP was initially promulgated. *See* 44 Fed. Reg. at 72,023-24.

[2] BLM, *Utah Wilderness Questions & Answers*, http://www.ut.blm.gov/utahwilderness/q&as.htm.

[3] *See Utah v. Babbitt*, 137 F.3d 1193, 1197-99 (10th Cir. 1998); BLM, *1999 Utah Wilderness Inventory*, http://www.ut.blm.gov/utahwilderness/background.htm.

and adhere to land use plans ("LUPs"). 43 U.S.C. § 1712; *see id.* § 1701(a)(2), (7); 43 C.F.R. § 1601.0-5(k); S. Rep. No. 94-583, at 45-46 (1975). Both the public at large and state and local governments have a right to participate in the process of LUP adoption. 43 U.S.C. § 1712(f); *see* 43 C.F.R. §§ 1610.2, 1610.5-2. Once adopted, an LUP is binding on BLM, which "*shall* manage the public lands . . . in accordance with . . . the land use plans." 43 U.S.C. § 1732(a) (emphasis added); *see also* 43 C.F.R. § 1610.5-3(a) ("All future resource management authorizations and actions . . . shall conform to the approved plan"). BLM may amend or revise an LUP at any time, but only with the same public involvement required for initial adoption. 43 C.F.R. §§ 1610.5-4 to -6.

In addition, Executive Orders issued by Presidents Nixon and Carter require BLM to designate areas and trails under its management as either open or closed to ORVs. Exec. Order No. 11644, 37 Fed. Reg. 2877 (Feb. 8, 1972), *amended by* Exec. Order No. 11989, 42 Fed. Reg. 26,959 (May 24, 1977). BLM's regulations require these ORV designations to occur with public input and as part of the FLPMA LUP process. 43 C.F.R. § 8342.2. Each LUP must designate whether the areas it covers are "open" to unrestricted ORV use, "limited" to specific ORV uses (such as on designated trails), or "closed" to ORVs. These designation decisions must minimize the damage to the environment and wildlife, as well as prevent impairment of a WSA's wilderness suitability. *Id.* § 8342.1. A BLM officer must also immediately close lands to ORV use where the officer determines that such use is causing or will cause "considerable adverse effects" on wilderness suitability. Exec. Order No. 11644; 43 C.F.R. § 8341.2.

C. NEPA and the Supplemental Analysis Requirement.

BLM's land management is also subject to the National Environmental Policy Act ("NEPA"), which declares a "national policy . . . to promote efforts which will prevent or

eliminate damage to the environment." 42 U.S.C. § 4321. NEPA achieves this policy "through a set of 'action-forcing' procedures that require that agencies take a 'hard look' at environmental consequences . . . and that provide for broad dissemination of relevant environmental information." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). Accordingly, NEPA forces an agency to analyze and publicize environmental impacts by preparing an environmental impact statement ("EIS") for "major Federal actions significantly affecting the quality of the human environment" – including LUPs. 42 U.S.C. § 4332(2)(C); *see* 40 C.F.R. §§ 1500.1-1508.28; 43 C.F.R. § 1601.0-6 (requiring preparation of EIS in connection with an LUP). "By so focusing agency attention, NEPA ensures that the agency will not act on incomplete information, only to regret its decision after it is too late to correct." *Marsh v. Or. Nat. Resources Council*, 490 U.S. 360, 371 (1989).

An agency's NEPA duties do not end when it completes its initial environmental analysis and approves a federal project. As this Court explained in *Marsh*:

> It would be incongruous with . . . the Act's manifest concern with preventing uninformed action, for the blinders to adverse environmental effects, once unequivocally removed, to be restored prior to the completion of agency action simply because the relevant proposal has received initial approval.

Id. Therefore,

> [i]f there remains "major federal actio[n]" to occur, and if . . . new information is sufficient to show that the remaining action will "affec[t] the quality of the human environment" in a significant manner or to a significant extent not already considered, a supplemental EIS must be prepared.

Id. at 374 (quoting 42 U.S.C. § 4332(2)(C)); *see also* 40 C.F.R. § 1502.9(c) (regulation mandating supplementation); *Marsh*,

490 U.S. at 372 (deferring to regulation).

Thus, in order to determine whether a supplemental EIS ("SEIS") is necessary, "NEPA ... require[s] that agencies take a 'hard look' at the environmental effects of their planned action, even after a proposal has received initial approval." *Marsh*, 490 U.S. at 374 (explaining that the agency must apply a "rule of reason" that "turns on the value of the new information").

II. The Escalating ORV Crisis and BLM's Failure to Act.

This case concerns BLM's failure to carry out its duties under FLPMA and NEPA in response to the recent explosion in ORV use on certain public lands in Utah. ORVs have many "legitimate uses," but they also "frequent[ly] conflict with wise land and resource management practices, environmental values, and other types of recreational activit[ies]." Exec. Order No. 11644. These ORV problems have recently mushroomed. BLM acknowledged in 2000 that "over the past several years, motorized recreation use has increased dramatically," but that BLM has not "carr[ied] out or enforce[d] the motorized O[R]V policies contained in the ... IMP" to prevent impairment of WSAs.[4] The increase in ORV use has been particularly acute on the fragile desert lands managed by BLM in Utah. In 1980, there were just over 9,000 registered ORVs in Utah. By 2000, that number had skyrocketed 900% to more than 83,000. SUWA Rule 28(j) Letter Ex. 2 (Feb. 8, 2002).

As it comes to this Court, this case concerns the destruction caused by the ORV explosion in nine specific areas in Utah managed by BLM – four WSAs and five § 202 areas. *See infra* at 8-10 & n.7; CA10 App. 48 (map).[5] At the time

[4] BLM, *Questions and Answers*, http://www.blm.gov/nhp/news/releases/pages/2000/pr000110_ohv_qa.html; BLM, *National Management Strategy for Motorized Off-Highway Vehicle Use on Public Lands*, http://www.blm.gov/ohv/OHV_FNL.pdf at 20.

[5] The WSAs are (1) Parunuweap, adjacent to Zion National Park and containing the East Fork of the Virgin River gorge, an oasis in an otherwise stark desert environment; (2) Moquith Mountain, home to the Coral Pink Sand Dunes; (3) Behind the Rocks, southwest of Arches National Park and home to spectacular geologic features such as towering redrock fins, knolls, and domes; and (4) Sids Mountain, featuring redrock canyons and native American archaeological sites. The § 202 lands are (1) Parunuweap, adjacent to Parunuweap WSA; (2) Behind the Rocks, adjacent to Behind the Rocks WSA; (3) Indian Creek, near Canyonlands National Park; (4) Wildhorse Mesa, south of Sids Mountain WSA; and (5) Muddy Creek-Crack Canyon, near Capitol Reef National Park and featuring the multicolored bentonite hills of Factory Butte.

SUWA filed this case, LUPs that BLM had adopted between 1980 and 1991 governed the management of these areas. Pet. App. 32a & n.18. None of the NEPA analyses for these LUPs anticipated the rapidly escalating ORV use the areas have witnessed in recent years. As a result, the relevant LUPs left most or all of each of the nine areas in question open to ORV use. In some cases, the LUPs limited ORV use to "existing ways," but even then, because "existing ways" generally were not designated, ORV users proceeded to create ever more "ways," scarring the landscape and converting formerly pristine features like streambeds to ORV raceways. Notwithstanding the substantial increase in adverse environmental impacts from ORVs, BLM has forthrightly admitted that "[u]p to this point the agency has not yet made any formal determination as to whether ... the preparation of a supplemental EIS" is required. CA10 App. 745.

Even before the more recent explosion in ORV use, two of the LUPs for lands at issue did contain provisions addressing the ecological damage done by unrestricted ORV use. The 1991 San Rafael Resource Management Plan ("San Rafael LUP"), which covers parts of the Wildhorse Mesa and Muddy Creek-Crack Canyon § 202 areas, limited ORV use to "designated" roads and trails but did not actually designate those routes. Instead, the LUP committed BLM to designate the routes by 1992 in a separate San Rafael Route

Designation Plan. *Id.* at 100, 648A-D, 650. Similarly, in light of damage from ORVs in the Factory Butte area, the 1990 Henry Mountains ORV Implementation Plan ("Henry Mountains LUP") obligated BLM to conduct an intensive ORV monitoring program to determine whether the agency's ORV regulation required ORV use to be restricted. *Id.* at 106-07; Pet. App. 25a. Yet when SUWA filed this case – *nearly a decade* after BLM adopted these two LUPs – the agency admitted that it had not carried out either commitment. Pet. App. 25a-26a; CA10 App. 4, 6, 503-05.

Given the agency's inaction in the face of the ORV crisis, BLM was forced to admit that "[i]mpairment has been, and continues to be caused by ORVs" in each of the four specific "Utah BLM managed wilderness study areas" at issue here. Cert. Opp. App. 59. That is, BLM conceded not only the devastating impact of ORVs, but actual "impairment," which FLPMA requires BLM to prevent. That admission is borne out by extensive record evidence of devastation by ORVs in all nine of the relevant WSAs and § 202 areas. *See, e.g.*, Ex. 3G, Prelim. Inj. Hr'g (July 11, 2002) (photographic evidence of scars to landscape caused by ORVs in these areas); CA10 App. 72, 460-61 (same); Pet. App. 61a-62a, 65a.

III. Procedural History.

A. District Court Proceedings.

Alarmed by this escalating and irreversible destruction, SUWA wrote to and met with the responsible BLM officials to demand that the agency comply with its legal duties concerning ORV use on Utah lands. Cert. Opp. App. 50-57. When BLM still did not comply, SUWA commenced this suit in late 1999, seeking declaratory and injunctive relief under § 706(1) of the APA to remedy BLM's unlawful failure to act.[6] After filing suit, SUWA moved for a preliminary injunction to preserve the status quo and prevent further

[6] Unless otherwise indicated, all citations to statutory sections in this brief are to the APA as codified in title 5 of the United States Code.

irreparable harm, singling out from the broader set of lands covered by the complaint the nine specific areas described above, and seeking immediate closure of those areas to ORVs. SUWA's preliminary injunction motion was predicated on several claims in SUWA's ten-count complaint, three of which are relevant here: that BLM had failed to act to prevent ORVs from impairing the wilderness suitability of WSAs, as required by FLPMA; that BLM had failed to act in conformity with approved LUPs, as required by FLPMA; and that BLM had failed to determine (*i.e.*, take a "hard look" at) whether it must prepare SEISs in response to the ORV explosion, as required by NEPA. CA10 App. 35-37 (Fifth, Sixth, and Seventh Causes of Action).

In opposing preliminary relief, BLM took the legal position that the undisputed impairment caused by ORVs in the four WSAs, Cert. Opp. App. 59, did not violate FLPMA's non-impairment mandate because the *entire* WSA had not been impaired. 8/30/00 Tr. vol. III 605 (asserting that FLPMA requires BLM to prevent impairment only "on a whole WSA basis"); 8/29/00 Tr. vol. II 305-06; 8/28/00 Tr. vol. I 29. BLM also contended that impairment is legally permissible if the impacts will "eventually disappear." 8/30/00 Tr. vol. III 508-09.

The respondent ORV Groups intervened and moved under Rule 12(b)(1) to dismiss the three counts of SUWA's complaint described above insofar as those claims pertained to the nine areas for which SUWA was seeking preliminary relief. CA10 App. 421; Pet. App. 75a-76a. BLM expressly declined to join in that motion. Pet. App. 57a.

After hearing testimony, the district court concluded that SUWA had presented "significant evidence" that impairment "is occurring in the WSAs due to ORV use." *Id.* at 65a. Nevertheless, based largely on the fact that BLM had taken some tentative steps to address the ORV problem and has some discretion about exactly how to satisfy its mandatory duties, the district court granted the ORV Groups'

motion to dismiss SUWA's Fifth, Sixth, and Seventh claims with prejudice – but *only* "to the extent these claims pertain to the [four] WSAs and [five] § 202 Areas addressed during the preliminary injunction hearing." *Id.* at 75a. The court denied SUWA's preliminary injunction motion as moot in light of that jurisdictional ruling. *Id.* at 76a. Finally, the court certified its partial dismissal of SUWA's complaint as a final appealable judgment pursuant to Rule 54(b). CA10 App. 878.[7]

B. The Tenth Circuit's Decision.

The Tenth Circuit reversed and remanded. In an opinion by Judge Ebel, the court stated that under § 706(1), "federal courts may order agencies to act only where the agency fails to carry out a mandatory, nondiscretionary duty," and concluded that each of the three duties SUWA seeks to enforce is mandatory and non-discretionary. Pet. App. 10a; *see id.* at 5a, 26a, 34a-35a, 38a. While BLM may have discretion about *how* to satisfy these duties, that discretion is relevant to the nature and scope of potential relief rather than to the court's § 706(1) jurisdiction. *Id.* at 12a-15a.

The Tenth Circuit also rejected BLM's argument that § 706(1) allows courts to compel only specific final agency action. The court observed that under § 706(1), the finality requirement applies to the agency's *inaction* on review (not, as BLM contended, to the action to be compelled):

> Where, as here, an agency has an obligation to carry out a mandatory, non-discretionary duty and either fails to meet an established statutory deadline for carrying out

[7] Thus, the district court's final appealable judgment – and the scope of this appeal in the Tenth Circuit and this Court – is limited to the dismissed claims pertaining to the nine specific areas. The district court also dismissed SUWA's First Claim for Relief as to those nine areas, but SUWA did not appeal that aspect of the ruling. SUWA 10th Cir. Br. 6 n.4. Finally, the district court granted SUWA's own motion to dismiss its Ninth Claim for Relief without prejudice. Pet. App. 76a.

> that duty or unreasonably delays . . . , *the failure to carry out that duty is itself "final agency action."*

Id. at 16a (emphasis added). BLM's view, the court explained, "would seem to create a 'no-man's-land' of judicial review, in which a federal agency could [flout] mandatory, nondiscretionary duties." *Id.* at 18a n.10.[8]

The court also rejected the argument that an agency can immunize itself from § 706(1) review by taking some steps – no matter how insubstantial or ineffective – toward satisfying its statutory mandate. While "BLM should be credited for the actions it has taken to comply with the nonimpairment mandate, . . . it does not follow [that those steps] . . . deprive[] a court of subject matter jurisdiction to determine whether [BLM] has actually fulfilled the statutorily mandated duty and potentially compel action if that duty has not been fulfilled." *Id.* at 20a.

Judge McKay concurred that courts have jurisdiction under § 706(1) to enforce NEPA's "hard look" requirement, *id.* at 39a, but dissented as to the FLPMA non-impairment and LUP claims because he believed that § 706(1) jurisdiction is limited by traditional mandamus standards, which in his view "require[] that the duty challenged be ministerial in nature." *Id.* at 45a.[9]

C. BLM's Post-Complaint Actions.

Prior to the filing of this suit in 1999, BLM took largely tentative, non-final steps to address the ORV crisis, such as meeting with ORV user groups to urge them to exercise re-

[8] BLM misleadingly states that the Tenth Circuit "concluded that the 'agency action' that may be compelled under Section 706(1) includes . . . 'day-to-day management actions' such as BLM's ongoing management of the wilderness study areas." BLM Br. 7 (citing Tenth Circuit opinion). In fact, the Tenth Circuit quoted the phrase "day-to-day management actions" from BLM's description of its own position. The court never endorsed the view that such actions are in any way at issue.

[9] After remand to the district court – but before this Court granted certiorari – SUWA filed a third amended complaint. Cert. Opp. App. 27-47.

straint. Faced with judicial scrutiny, however, BLM has taken some more definitive action concerning ORVs since this suit commenced. Pursuant to 43 C.F.R. § 8341.2, BLM issued temporary emergency closure orders for the Parunuweap, Behind the Rocks, and Sids Mountain WSAs that limited ORVs to certain designated routes.[10] For the Moquith Mountain WSA, BLM amended its LUP to close additional areas.[11]

After SUWA sued, BLM also took action to comply with its LUP duties by initiating the long-promised monitoring program at Factory Butte, Pet. App. 31a n.17, and, more recently, releasing the long-overdue San Rafael Route Designation Plan.[12] BLM has not, however, taken any action to comply with its "hard look" duty under NEPA.[13]

The Tenth Circuit instructed the district court to consider mootness on remand, cautioning, however, that mootness does not automatically follow from voluntary cessation of challenged activity. Pet. App. 31a n.17.

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[10] 65 Fed. Reg. 52,437 (Aug. 29, 2000) (Parunuweap); 66 Fed. Reg. 6659 (Jan. 22, 2001) (Behind the Rocks); 65 Fed. Reg. 15,169 (Mar. 21, 2000) (Sids Mountain).

[11] 65 Fed. Reg. 19,921 (Apr. 13, 2000).

[12] BLM, *San Rafael Route Designation Plan*, http://www.ut.blm.gov/sanrafaelohv/wtheplan.htm.

[13] Thus, each of the BLM actions recited by the ORV Groups was *either* tentative and non-final, *or* occurred after SUWA commenced this action. *See* ORV Groups Br. 8. The one exception is a 1998 emergency closure of the Indian Creek § 202 area, which limited ORV travel to existing ways (without identifying those ways). However, SUWA's sole claim concerning Indian Creek is that BLM has violated NEPA by failing to take a "hard look" at whether to prepare an SEIS. The 1998 emergency closure order did not purport to address that obligation (and a new analysis might propel BLM to make further, or permanent, closures).

SUMMARY OF ARGUMENT

The Court of Appeals correctly held that the district court has jurisdiction to consider SUWA's three inaction claims concerning the devastation by ORVs of nine specific WSAs and § 202 areas. BLM acknowledged that ORV use is impairing the four WSAs and causing unforeseen impacts to fragile public lands in all nine areas. Given those facts, the court below was right to reject BLM's contention that federal courts altogether lack jurisdiction to determine whether the agency's failure to meet this crisis is violating acts of Congress and to enter general orders compelling compliance with the law for such violations.

1. Under FLPMA, BLM has a mandatory duty to manage WSAs so their wilderness suitability is not impaired. Section 706(1) of the APA provides a remedy when the agency's failure to act violates that mandatory duty. The APA authorizes judicial review of all "final agency action" and defines "agency action" to include an agency's partial or total "failure to act." Section 706(1) defines the scope of the judicial review and remedy for an agency's final failure to act, just as § 706(2) does for an agency's final affirmative actions. Together, these provisions cover the universe of reviewable agency action and inaction, as Congress intended. The novel restrictions proposed by BLM would establish a "no-man's-land" of agency inaction that is both unlawful and immediately harmful, yet unreviewable. Indeed, BLM unabashedly contends that review of its unlawful failure to prevent the irreversible impairment of WSAs will *never* be available so long as the agency's inaction continues. That contravenes the APA and common sense.

BLM's argument that inaction is redressable under § 706(1) only when the act to be compelled would constitute final agency action has it backwards. Under the APA, it is the matter to be reviewed – not the action to be compelled – that must be final. The APA's plain language, decades of case law, and pre-APA mandamus practice all make clear

that judicial review of inaction is available when that *inaction* is final, regardless whether the affirmative action to be compelled as a remedy would also be final. Under the APA's flexible and pragmatic conception of finality, inaction – like affirmative action – is final when it is sufficiently consequential and definitive. BLM's failure to act is final here both because FLPMA creates a continuous duty to avoid impairment and because BLM's failure to do so is daily causing irreparable harm to the interests Congress sought to protect.

Equally spurious is BLM's contention that its unlawful inaction is immune to review because the agency has some discretion about how to satisfy FLPMA's non-impairment mandate. BLM's discretion concerning *how* to comply with FLPMA cannot be expanded into unreviewable discretion *not* to comply. BLM makes no serious attempt to ground this proposed restriction in the APA itself. Instead, BLM points to pre-APA mandamus practice in an attempt to narrow the APA. Yet – as BLM is forced to admit – mandamus was historically available to compel an agency to comply with a legal duty involving discretion so long as the court ordered the agency to comply with the duty without telling it how to exercise its discretion. That is entirely consistent with enforcing FLPMA's non-impairment mandate through an order compelling BLM to comply without telling it how.

Nor does the mere fact that BLM took some tentative – albeit ineffective – action bar relief. FLPMA does not just require BLM to take *some* action, but instead mandates that the agency manage WSAs so their wilderness suitability is *not impaired*. The APA confers judicial power to compel the agency to comply with its actual statutory duty – a duty that BLM took no final and reviewable steps to satisfy until after this suit was filed. At the same time, whether the agency's *post-complaint* actions moot SUWA's claims is a difficult issue the district court should address on remand, taking into account the doctrine that voluntary cessation of illegal-

ity does not always bar relief.

Finally, notwithstanding BLM's rhetoric, the jurisdiction of courts under the APA to review and remedy unlawful agency inaction does not intrude on "ongoing," "day-to-day," or "programmatic" agency affairs. The limits on review Congress actually provided in the APA – not some newly minted immunity – are a complete answer to such concerns.

2. Section 706(1) also provides a remedy when BLM fails to take specific actions required by LUPs that the agency has formally promulgated after public input. The plain language of FLPMA imposes a mandatory duty to adhere to LUPs, and the two LUP provisions at issue created mandatory duties to act. Nothing supports BLM's bare assertion that the duty to abide by an LUP is one-sided and constrains BLM only when it acts to protect public lands from ORVs and is challenged by ORV users, but not when it fails to act to provide such protection and is challenged by those who seek to preserve an area's wilderness character.

3. Finally, as this Court held in *Marsh*, NEPA requires agencies to make a determination – *i.e.*, take a "hard look" at – whether new information arising in the context of ongoing major federal action requires preparation of an SEIS. That is also a mandatory duty that may be enforced under § 706(1). The supplemental "hard look" duty can be enforced not only when the agency does something new or changes course, but also when the agency still *can change course* in ongoing action in response to new information, as it can here. In this context, NEPA is literally "action forcing." Moreover, there is no merit to BLM's contention – which it did not raise before the Tenth Circuit – that BLM's ongoing management pursuant to an LUP does not constitute ongoing major federal action that, when combined with changed circumstances, can trigger a duty to prepare an SEIS.

ARGUMENT

I. Section 706(1) Provides a Remedy for BLM's Inaction Violating FLPMA's Non-Impairment Mandate.

"[I]n the APA, Congress did not set agencies free to disregard legislative direction in the statutory scheme that the agency administers." *Heckler v. Chaney*, 470 U.S. 821, 833 (1985). BLM contends, however, that it is free to disregard its mandatory duty under FLPMA to prevent impairment of the wilderness suitability of WSAs. BLM asserts that the FLPMA duty "is not judicially enforceable under Section § 706(1)" – no matter what. BLM Br. 10-11. It thus stakes out the extreme position that its disregard of the duty imposed by Congress will *never* be reviewable so long as BLM does not take final agency action subject to review under § 706(2). That position is untenable. As Judge Easterbrook observed in this context:

> Only in the world of Kafka would a court dismiss a claim that an agency has taken too long to reach a decision on the ground that the agency has yet to reach a decision – and that the aggrieved party can't complain until it does (by which time, of course, the claim will be moot).

Valona v. United States Parole Comm'n, 165 F.3d 508, 510 (7th Cir. 1998).

A. The Language, Structure, and Purpose of the APA Plainly Provide for Review Here.

Section 706(1) provides, in simple and unambiguous terms, that "[t]he reviewing court shall ... compel agency action unlawfully withheld or unreasonably delayed." § 706(1). "Agency action," in turn, is defined broadly to encompass the full sweep of agency activity, including failures to act. *See* § 551(13) ("'agency action' includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act"); *FTC v. Standard Oil Co.*, 449 U.S. 232, 238 n.7 (1980) (explaining that

broad definition of "term 'agency action' ... assure[s] the complete coverage of every form of agency power, proceeding, action, or inaction," and "includes the supporting procedures, findings, conclusions, or statements or reasons or basis for the action or inaction") (quotation marks omitted). On its face, this capacious language provides a remedy when BLM unlawfully withholds agency action needed to satisfy FLPMA's mandate that the agency "continue to manage [WSAs] so as not to impair the suitability of such areas for preservation as wilderness." 43 U.S.C. § 1782(c).

This straightforward reading of § 706(1) is confirmed when the provision is placed in context and the APA is read as a whole. The APA's "review provisions" are "generous," and their "purpose was to remove obstacles to judicial review of agency action under subsequently enacted statutes like" FLPMA. *Shaughnessy v. Pedreiro*, 349 U.S. 48, 51 (1955); *accord Bennett v. Spear*, 520 U.S. 154, 163 (1997). Thus, the Court has "construed [the APA] not grudgingly but as serving a broadly remedial purpose." *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 156 (1970). And it has repeatedly recognized the APA's "basic presumption" in favor of judicial review, requiring that "judicial review of a final agency action ... not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967); *see Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971); S. Rep. No. 79-752, at 193 (1945) (APA provides system of "judicial review designed to afford a remedy for every legal wrong"); H.R. Rep. No. 79-1980, at 275 (1946).[14]

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[14] The APA's normal presumption of reviewability is subject to a narrow exception for agency decisions not to commence or prosecute enforcement proceedings. *See Heckler*, 470 U.S. at 831. BLM does not even try to argue that this exception applies here, however, because SUWA is not seeking to compel any type of enforcement proceeding. In any event, even if *Heckler*'s limited presumption of unreviewability applied, that

The APA's generous review provisions extend equally to agency *inaction*. Congress expressly defined "agency action" to include not only affirmative actions, but also an agency's "failure to act."[15] § 551(13); *see Standard Oil*, 449 U.S. at 238 n.7. Section 706(1) is integral to the APA's approach of treating failures to act as a type of agency action because it allows "properly interested parties to compel agencies to act where they improvidently refuse to act." S. Rep. at 214; H.R. Rep. at 278 (same). The key prerequisite, as the Tenth Circuit recognized, is the presence in a statute (whether the APA itself or another law) of a "mandatory, nondiscretionary duty." Section 706(1) thus complements § 706(2), which authorizes "[t]he reviewing court" to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." § 706(2)(A). Together, these two sections provide remedies for the universe of reviewable agency action and inaction.

In the APA, Congress did create three express limits on judicial review of agency action and inaction. First, Congress can bar judicial review either by expressly precluding review in a statute or by "committ[ing]" a matter "to agency discretion by law." § 701(a). Second, the plaintiff must have standing – *i.e.*, be "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action." § 702. Third, absent some specific statutory provision to the contrary, only "*final* agency action for which there is no other adequate remedy in a court [is] subject to judicial review." § 704 (emphasis added). By adopting these and no other structural limitations, Congress

presumption would rebutted, and BLM's inaction would be reviewable, because Congress has circumscribed the agency's discretion with substantive standards providing "law to apply." *Id.* at 830; *see infra* at 29.

[15] This brief uses the term "affirmative" agency action for any agency action other than a "failure to act." The term thus encompasses express denial of relief, in contrast to *de facto* denial through inaction.

struck a balance between preventing undue judicial intrusion into agency decisionmaking and assuring that unlawful or arbitrary agency actions are subject to judicial review and correction when they cause real-world injury, such as impairment to WSAs.

BLM does not claim that the first two limits bar review. And, as we show immediately below, the APA's finality requirement is met here as well. Because the terms of § 706(1) and the limits on judicial review enacted in the APA are satisfied, BLM's unlawful failures to act are subject to review in this case.

B. For § 706(1) Review, the Agency's Failure to Act Must Be Final – Regardless Whether the Action to Be Compelled Would Also Be Final.

BLM contends that its unlawful failure to comply with FLPMA's non-impairment mandate is exempt from review because only agency actions that are themselves final may be compelled under § 706(1). But the law is clear that the APA's finality requirement applies to the *inaction* to be *reviewed*, not the *affirmative action* to be *compelled* as a remedy. The finality requirement thereby prevents premature judicial review of agency inaction or delay, but also permits immediate review where the agency's inaction is sufficiently definitive and has direct real-world consequences.

1. The APA's Text, Decades of Well-Established Law, and Pre-APA Mandamus Practice All Demonstrate That the Finality Requirement Applies to the Agency's Inaction.

Section 704 of the APA provides that "final agency action for which there is no other adequate remedy in a court [is] subject to judicial review." Section 551(13), in turn, defines "agency action" to "include[] . . . failure to act." Putting these two provisions together, an agency's "final [failure to act] for which there is no other adequate remedy in a court [is] subject to judicial review." Thus, even with-

out recourse to § 706(1), the APA authorizes judicial review of an agency's inaction – if the failure to act is final.

Section 706(1) provides the remedy in such a case: "[t]he reviewing court shall (1) compel agency action unlawfully withheld or unreasonably delayed." Plainly, under § 706(1) the agency action to be *compelled* as a remedy is *different* from the agency action – the failure to act – that is being *reviewed*. Just as plainly, § 704 imposes the finality requirement on the failure to act – the "agency action . . . subject to judicial review" – not on the affirmative action to be compelled.[16]

BLM nevertheless insists that the Court should insert the word "final" into the text of § 706(1) to modify the action to be compelled as a remedy – as if the statute said that "the reviewing court shall (1) compel [final] agency action unlawfully withheld or unreasonably delayed." But BLM's view has no textual support: § 704 imposes the finality requirement on the agency action to be reviewed, not the remedy, and under § 706(1) the agency action subject to judicial review is the failure to act, not the affirmative action compelled. *See, e.g., Costle v. Pac. Legal Found.*, 445 U.S. 198, 220 n.14 (1980) (under § 706(1), party "may obtain judicial review of . . . agency inaction").

BLM also suggests that, even apart from § 704's finality requirement, the scope of § 706(1) is limited by the definition of "agency action" in § 551(13). That is incorrect. A finality requirement cannot be smuggled into the definition of "agency action" itself. *See supra* at 16 (discussing breadth of "agency action"); *Whitman v. Am. Trucking Ass'ns*, 531

[16] In contrast, affirmative agency action is what is generally subject to judicial review under § 706(2), so under that provision the agency's affirmative action must be final to be reviewable. Thus, under both § 706(1) and § 706(2), the finality requirement applies to the "agency action" that is to be reviewed. Therefore, contrary to BLM's suggestion, BLM Br. 16, this straightforward and logical reading does not give "agency action" different meanings in § 706(1) and § 706(2).

U.S. 457, 478 (2001) ("The bite in the phrase 'final action' . . . is not in the word 'action,' which is meant to cover comprehensively every manner in which an agency may exercise its power. . . . It is rather in the word 'final' . . ."). Finality is not required by § 551(13), but rather by § 704, which would be rendered superfluous under BLM's view.

This straightforward reading of the statute is confirmed by *decades* of decisions from the courts of appeals. BLM is unable to cite a single case adopting its position that § 706(1) does not apply unless the action to be compelled is itself final. Rather, courts have uniformly applied the finality requirement to the agency's failure to act that is under review.[17] As the Fourth Circuit explained decades ago:

> When a party suffers a legal wrong from continuing agency delay and, as here, there is no other adequate administrative or judicial remedy, *the delay is final agency action* for which [the APA] does provide an effective remedy.

Deering Milliken, Inc. v. Johnston, 295 F.2d 856, 861-66 (4th Cir. 1961) (emphasis added). And the D.C. Circuit recently explained:

> [W]here an agency is under an unequivocal statutory duty to act, *failure so to act constitutes*, in effect, an affirmative act that triggers *final agency action* review. Were it otherwise, agencies could effectively prevent judicial review of their policy determinations by simply refusing to take final action.

Cobell v. Norton, 240 F.3d 1081, 1095 (D.C. Cir. 2001) (emphasis added) (quotation marks and citations omitted) (citing, *e.g., Public Citizen Health Research Group v. Comm'r, FDA*, 740 F.2d 21, 32 (D.C. Cir. 1984) ("At some point administrative

[17] On occasion, courts have loosely stated that § 706(1)-type review is an "exception" to the finality requirement. *See, e.g., Action on Smoking & Health v. Dep't of Labor*, 28 F.3d 162, 163-64 (D.C. Cir. 1994). But that conflicts with the plain language of § 704.

delay amounts to a refusal to act, with sufficient finality and ripeness to permit judicial review") (quotation marks omitted)).[18]

Pre-APA mandamus law – which BLM itself asserts § 706(1) "codified" – also refutes BLM's claim that courts may compel only a final agency action. A clear example is *United States v. Los Angeles & Salt Lake Railroad Co.*, 273 U.S. 299 (1927), in which the plaintiff challenged the accuracy of an asset valuation that the ICC was required by law to perform as a step to further agency action. The Court, per Justice Brandeis, held that the valuation was not itself a final action subject to judicial review. *Id.* at 310. Nevertheless, the Court observed that if the ICC failed to make any valuation at all, the plaintiff had "the remedy by mandamus to compel the Commission to make a finding" as required by statute. *Id.* at 311. Thus, mandamus could be used to command agencies to fulfill their statutory obligations, even if the action ordered would not itself be final and reviewable agency action. *See also, e.g., ICC v. United States ex rel. Humboldt S.S. Co.*, 224 U.S. 474, 477-79 (1912) (granting mandamus ordering agency to take non-final action by assuming jurisdiction over common carrier), *cited in* United States Dep't of Justice, *Attorney General's Manual on the Administrative Procedure Act* 108 (1947) ("A.G.'s Manual").[19] Indeed, as these cases illustrate, compelling non-final

[18] *See also, e.g., Thompson v. United States Dep't of Labor*, 813 F.2d 48, 52-53 (3d Cir. 1987); *Sierra Club v. Peterson*, 228 F.3d 559, 568 (5th Cir. 2000) (en banc); *Ligon Specialized Hauler, Inc. v. ICC*, 587 F.2d 304, 314 (6th Cir. 1978); *Home Builders Ass'n of Greater Chicago v. United States Army Corps. of Eng'rs*, 335 F.3d 607, 616 (7th Cir. 2003); *Houseton v. Nimmo*, 670 F.2d 1375, 1377-78 (9th Cir. 1982); *Nat'l Parks Conservation Ass'n v. Norton*, 324 F.3d 1229, 1238 (11th Cir. 2003); Peter H.A. Lehner, Note, *Judicial Review of Administrative Inaction*, 83 Colum. L. Rev. 627, 652-55 (1983).

[19] *ICC v. New York, New Haven & Hartford Railroad Co.*, 287 U.S. 178 (1932), on which BLM relies, is not to the contrary. That case simply held that mandamus does not lie to compel the ICC to value property in a *particular* manner. *See also infra* at 30-31.

actions that are mandated by Congress but unlawfully withheld by the agency may be necessary to ensure that subsequent final action occurs.[20]

2. BLM's Inaction Is "Final" Because It Is Sufficiently Consequential and Definitive.

As applied to agency inaction, just as to affirmative action, the APA's finality requirement is both "pragmatic" and "flexible." *Abbott Labs.*, 387 U.S. at 149-50. Its function is to forestall premature judicial intrusion into agency affairs, while still allowing review when necessary to preserve substantial rights. One aspect of this pragmatic inquiry is whether the agency's action or inaction has "direct consequences." *Franklin v. Mass.*, 505 U.S. 788, 798 (1992). Ordinarily, review is immediately available when the effects of agency conduct are "felt in a concrete way by the challenging parties" such that "withholding court consideration" would cause them "hardship." *Abbott Labs.*, 387 U.S. at 148-49; *see also Bennett*, 520 U.S. at 178 (to be final, "the action must be one by which rights or obligations have been determined, or from which legal consequences will flow") (quotation marks omitted). In contrast, where some further step is needed before there will be real-world effects, review will deferred. *E.g., Franklin*, 505 U.S. at 798.

A second aspect of finality looks to whether the agency's action is "definitive," rather than "informal, or only the ruling of a subordinate official, or tentative." *Abbott Labs.*, 387 U.S. at 151 (citations omitted); *see also Bennett*, 520 U.S. at 177-78 ("the action must mark the consummation of the

[20] Of course, § 706(1) is frequently used to compel the agency to take an action that would be final and reviewable under § 706(2). In such cases, a court with exclusive jurisdiction to review the agency's final affirmative action also has exclusive jurisdiction to compel the agency to take such action. *See, e.g., Telecomms. Research & Action Ctr. v. FCC*, 750 F.2d 70, 75-76 (D.C. Cir. 1984) (deriving exclusive jurisdiction from mandamus principles); A.G.'s Manual at 108. That in no way restricts the use of § 706(1) to such situations.

agency's decision making process – it must not be of a merely tentative or interlocutory nature") (quotation marks and citation omitted). Consistent with the pragmatic nature of finality, the courts of appeals have recognized that in inaction cases this second aspect of finality is satisfied when the agency's failure to act is sufficiently "definitive." *See, e.g., Nat'l Parks*, 324 F.3d at 1239-40 (referring to "inaction that can be said to mark the consummation of the agency's decisionmaking process") (quotation marks omitted); *see also supra* at 21 & n.18.

Based on these two considerations, at least four relevant (and sometimes overlapping) scenarios in which courts deem inaction to be final emerge from the case law. BLM's inaction with respect to its non-impairment duty – its failure to manage the four WSAs at issue so as not to impair their wilderness suitability – qualifies as "final," and thus reviewable, under each of these four categories.

First are cases in which the agency is under a mandatory duty that does not give the agency discretion to defer action. The paradigm is when the agency fails to meet a specific *statutory deadline* to take action, because a deadline set by Congress creates a clear point at which the agency's failure to act becomes definitive and final. As this Court has noted, a statute stating that an agency "shall" do something within a set period of time is not discretionary and may be enforced under § 706(1). *Brock v. Pierce County*, 476 U.S. 253, 260 n.7 (1986); *see also, e.g., In re Ctr. for Auto Safety*, 793 F.2d 1346, 1353 (D.C. Cir. 1986) (if statute "designates a specific deadline for agency," then "failure to meet the statutory requirement is 'not in accordance with law'"); *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1190-93 (10th Cir. 1999).

The Tenth Circuit correctly held that BLM's inaction is final under this category. The non-impairment provision in FLPMA imposes a *continuous* mandatory duty that is equivalent to an express deadline. Pet. App. 9a-10a n.5, 17a & n.9. This is reflected not just in the statutory language, 43

U.S.C. § 1782(c) (mandating that BLM "*shall continue* to manage such lands . . . so as not to impair the suitability of such areas for preservation as wilderness") (emphasis added), but also in the very nature of the duty imposed. Once an area is identified as a WSA, BLM is responsible for maintaining the status quo to protect Congress's prerogative to make a wilderness designation at any time. Thus, this particular mandate – like a deadline, but unlike many duties imposed on agencies – does *not* give BLM discretion to put off action and attend to the matter later. By the time impairment occurs, it is already too late.[21]

Second, inaction is also final and reviewable when it threatens *imminent irreparable harm* to a legally protected interest. As the D.C. Circuit explained over three decades ago, in the ordinary case "relief delayed is not . . . equivalent to relief denied." *Envtl. Defense Fund, Inc. v. Hardin*, 428 F.2d 1093, 1099 & n.29 (D.C. Cir. 1970). But where delay results in "irreparable harm" that cannot – by definition – be remedied by later judicial review, then the agency's "inaction results in a final disposition of such rights as the petitioners and the public may have." *Id.* Under such circumstances, "administrative inaction has precisely the same impact on the rights of the parties as denial of relief," rendering it final under the APA. *Id.*; *accord Cobell*, 240 F.3d at 1097; *Sierra Club v. Thomas*, 828 F.2d 783, 795 (D.C. Cir. 1987); *Envtl. Defense Fund, Inc. v. Ruckelshaus*, 439 F.2d 584, 589-90 & n.8 (D.C. Cir. 1971).

Here, BLM's inaction irreparably harms the wilderness suitability of the four WSAs, thereby "result[ing] in a final

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[21] The ORV Groups suggest that SUWA could have challenged the relevant land use plans at the time of their adoption for violating FLPMA's non-impairment mandate. ORV Groups Br. 5. This suggestion ignores the fact that BLM adopted the relevant plans many years earlier when ORV use was much less intensive and no non-impairment claim could legitimately have been raised. SUWA's claim arose only when ORV use had increased past the point of impairment.

disposition of such rights as the petitioners and the public may have." *Hardin*, 428 F.2d at 1099. In this particular case, this ground of finality is related to the first – Congress gave BLM no discretion to defer action to prevent impairment precisely because impairment is irreparable once it occurs.

Third, inaction is final where *legal error* causes the agency to abdicate its duty. In such cases, the agency's failure to act does not result from discretionary priorities or the need for further work on a problem, but from the agency's legally erroneous view that it has no duty to act. *E.g., Adams v. Richardson*, 480 F.2d 1159, 1163-64 (D.C. Cir. 1973) (en banc); *see Firebaugh Canal Co. v. United States*, 203 F.3d 568, 573, 577-78 (9th Cir. 2000); *see also infra* at 30-31 (discussing *Humboldt*, 224 U.S. at 485). BLM's inaction here reflects this kind of legal error. BLM argued below that it has no legal duty to prevent impairment that is limited to only part of a WSA or that will "eventually disappear." *Supra* at 9. Courts have jurisdiction to correct such errors and order the agency to act in compliance with the mandatory duty actually imposed by Congress.

Fourth, even where a statute does not demand immediate action, irreparable harm is not threatened, and there is no legal error, an agency still has a general and mandatory duty to act on matters within a "reasonable time" – an obligation that is imposed by the APA, 5 U.S.C. § 555(b), and often arises from other statutes as well. *See, e.g., Thomas*, 828 F.2d at 794. By its nature, the general "reasonableness" standard for timely action, where applicable, gives an agency considerable discretion in ordering its own priorities, unless the delay becomes sufficiently egregious that a court will find final inaction. *See, e.g., Int'l Nat. Gas Ass'n of Am. v. FERC*, 285 F.3d 18, 57-58 (D.C. Cir. 2002) (stating that judicial review of agency inaction in this area "is highly deferential"); *Cobell*, 240 F.3d at 1096; *Caswell v. Califano*, 583 F.2d 9, 15-16 (1st Cir. 1978). Courts generally apply a "rule of reason" guided by six so-called *"TRAC* factors," under

which the reasonableness of the delay turns in part on the statutory scheme and the interests prejudiced by delay. *See Telecomms. Research & Action Ctr. v. FCC*, 750 F.2d 70, 80 (D.C. Cir. 1984) (*"TRAC"*). In this case, even if the first three categories did not dictate a finding of finality, BLM's long delay in acting to prevent impairment is sufficiently unreasonable to make review appropriate. *Supra* at 8.[22]

C. Section 706(1) Provides a Remedy to Enforce a Mandatory Duty Even Where the Agency Has Discretion Concerning *How* to Comply.

In addition to its finality argument, BLM contends that a court can compel agency action under § 706(1) only if the agency is under a specific duty to perform a particular act. *E.g.*, BLM Br. 26 (*"precise, definite act* that [the agency] ha[s] no discretion whatever not to perform") (emphasis added) (quotation marks omitted). BLM's position seems to be that even though the non-impairment duty is mandatory and leaves BLM no discretion to allow impairment, that duty still cannot be enforced under § 706(1) because the agency has discretion *how* to satisfy it. This effort by BLM to preclude judicial scrutiny of its unlawful failure to meet Congress's mandate also fails.

1. Relief Under § 706(1) Depends on Whether a Duty Is Mandatory, Not on Its Specificity.

As noted at the outset, § 706(1) review must be premised on a statute creating a mandatory, non-discretionary duty. Here, such a duty certainly exists. As the Tenth Circuit put it:

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[22] In any event, even if BLM's flawed interpretation were correct and a § 706(1) claim must seek to compel a final agency action, the non-impairment claim dismissed by the district court would nevertheless survive here, because the actions sought to be compelled – orders to take action closing areas to ORVs or limiting their use to prevent impairment – would be final agency action. The same is true of SUWA's claim under the San Rafael LUP and its NEPA claim, as discussed below. *See infra* at 43-44, 49-50.

> The BLM's argument . . . misses the narrow jurisdictional issue presented on appeal, *i.e.*, whether the BLM has a nondiscretionary, mandatory duty that it may be compelled to carry out under § 706(1). Neither side seriously disputes that the BLM has such a duty under the FLPMA, which mandates that the BLM manage WSAs in such a way as not to impair their wilderness values. *See* 43 U.S.C. § 1782(c).

Pet. App. 13a.

By its plain terms, § 706(1) applies to *any* failure to act in the face of a mandatory duty, such that "agency action [is] unlawfully denied or unreasonably delayed." Nothing in that language refers to the *specificity* of the mandatory duty, requires it to be ministerial, or precludes resort to § 706(1) when the agency has some discretion *how* to comply with the duty. Nor does § 551(13)'s definition of "agency action" narrow the scope of § 706(1) to apply only to highly specific duties, as BLM seems to argue. As explained above, Congress intentionally defined "agency action" in the broadest possible terms. *Supra* at 16, 20. In any event, the fact that the definition includes a number of specific actions that agencies may take or fail to take ("rule, order, license, sanction, relief . . . .") says nothing about the specificity of the *duty* to be enforced under § 706(1), much less that in order to be enforceable a statute imposing a duty must state the precise agency action required to comply.

Jurisdiction to enforce statutory mandates thus extends to more general mandates to act, regardless whether they leave room for agency discretion concerning *how* to comply. For example, in *Cobell*, the D.C. Circuit, per Judge Sentelle, observed that the Department of the Interior has significant discretion in carrying out certain fiduciary duties imposed by statute and common law, but rejected the agency's argument that this discretion barred the court from enforcing those broad fiduciary mandates with an appropriate injunction. 240 F.3d at 156, 159, 167-70. The court held that the

agency's violation, through inaction, of its mandatory duty could be reviewed and corrected under § 706(1), even though the law does not specify any particular steps to be taken. *Id.* at 165-66.

That § 706(1) extends to enforcing mandatory duties that are stated in general terms is further confirmed by the section's express authorization of orders compelling actions "unreasonably delayed." An agency's general duty (in the absence of a statutory deadline) to act on matters before it within a "reasonable time," *see* § 555(b) – though mandatory – is the very opposite of a highly specific or ministerial function that excludes all discretion. *See supra* at 26 (reasonableness of agency's delay reviewed deferentially under multifactored *TRAC* analysis). Yet § 706 leaves no room for doubt that a court can compel an agency to comply with the generalized "unreasonably delayed" standard, as BLM concedes. *See, e.g.*, BLM Br. 17, 20, 24-26, 35.

The drafters of the APA were not unaware of the relationship between discretion and reviewability. They addressed that relationship in creating an immunity from review for matters "committed to agency discretion by law." § 701(a)(2). But BLM does not invoke that exception because it cannot argue that *whether* to prevent impairment is committed to its discretion by law. The mandatory nature of BLM's duty is fleshed out by FLPMA itself, which "explicitly states how the land is to be managed," 6 Op. Off. Legal Counsel at 64, and by the further specifications in BLM's binding IMP. Indeed, the notion that the duty at issue here is "general" rather than "specific" is itself only true up to a point; BLM has some discretion about how to prevent impairment, but a court certainly has the ability to decide whether the agency has done so in a given case. In effect, BLM is trying to escape such review simply because it has *some* discretion in how to comply. That novel exception

finds no warrant in the APA.[23]

2. Pre-APA Mandamus Practice Confirms That Courts Can Compel Compliance with Duties That Afford Room for Discretion.

Lacking support in the APA for its position that only very specific duties can be enforced under § 706(1), BLM turns instead to pre-APA mandamus practice, which, according to the Attorney General's Manual, "appears" to have been codified by § 706(1). A.G.'s Manual at 108; *see also Darby v. Cisneros*, 509 U.S. 137, 148 n.10 (1993) (giving "some" weight to Manual). But the sources on which BLM relies undermine rather than support its argument.

As an initial matter, Congress's own legislative reports and the Attorney General's Manual make clear that "in matters of administrative discretion" a "court may require agencies to act but may not under [§ 706(1)] tell them how to act." Senate Comm. on the Judiciary, 75th Cong., Administrative Procedure Act 40 (Comm. Print 1945); *see* A.G.'s Manual at 108 (explaining that under § 706(1) a court can compel an agency *either* to perform "ministerial" actions *or* to "take action upon a matter, without directing how it should act"). Thus, agency discretion in how to comply with a duty does not affect jurisdiction under § 706(1).

The two mandamus cases cited as illustrations by the Manual, at 108, also demonstrate that courts may enforce mandatory but general duties. In *Safeway Stores v. Brown*, 138 F.2d 278 (Emer. Ct. App. 1943), the court stated that "mandamus will lie ... even though the act required involves the exercise of judgment and discretion." *Id.* at 280. And in *Humboldt*, 224 U.S. 474, this Court held that mandamus lies to compel an agency to exercise jurisdiction over a

[23] As the Tenth Circuit observed, "BLM appears at times to assume erroneously that because it possess discretion over the *implementation* of the nonimpairment mandate, the nonimpairment obligation is itself wholly discretionary." Pet. App. 14a.

party, without specifying what actions the agency should take after having done so. *Id.* at 485. *Humboldt* also held that mandamus is proper when an agency's inaction rests on "a misunderstanding of law," *id.* at 484 – like BLM's theory that it has no legal duty to prevent the impairment here. As *Humboldt* recognized, an agency's failure to act due to legal error must be reviewable, lest the agency have "the power to nullify its most essential duties." *Id.* at 484.

Thus, as Chief Justice Taft explained in another case, mandamus "cannot be used to compel or control a duty in the discharge of which by law [an officer] is given discretion" – but such a "duty may be discretionary *within limits.*" Where discretion is thus limited, the officer "cannot transgress those limits, and if he does so, *he may be controlled by injunction or mandamus to keep within them.*" *Work v. United States ex rel. Rives*, 267 U.S. 175, 177 (1925) (emphasis added); *see also id.* at 184 ("there is a class of cases in which a relator in mandamus has successfully sought to compel action by an officer who has discretion concededly conferred on him by law").

Ultimately, BLM is forced to acknowledge that under pre-APA mandamus practice a court could compel an agency to act in compliance with a mandatory duty so long as the court did not tell the agency how to exercise whatever discretion it possesses. BLM Br. 24-26. But BLM then asserts that any such application would require a court to direct the agency "how to act" and thus "would almost inevitably require a court to substitute its judgment and discretion for those of the agency." *Id.* at 26-27. BLM offers no explanation for this conclusion, nor is there one. Nothing prevents a court from issuing a declaration or order requiring agency action to comply with the law without specifying what that action should be, and SUWA's complaint plainly left room for such relief. *See, e.g., Humboldt*, 244 U.S. at 485 (affirming order compelling ICC "'to take jurisdiction of said cause and proceed therein as by law required'"); *see also*

infra at 38-39 (discussing role of court's equitable discretion).[24]

D. That BLM Took Some Action – Short of Final Affirmative Agency Action – Did Not Render Its Failure to Act Unreviewable.

1. Section 706(1) Applies to Partial Inaction.

Having conceded that a court can compel an agency to comply with a mandatory duty that leaves some scope for agency discretion, BLM echoes the ORV Groups' main contention by attempting to limit that rule to cases in which the agency "fails to act *at all*." BLM Br. 35. The authorities BLM cites – the Attorney General's Manual and *Work*, 267 U.S. 175 – offer no support for such a limitation.[25] And the proposed limitation is contrary to the APA itself.

Reviewable agency action specifically includes *partial* failures to act. § 551(13) (defining "agency action" to include "the whole or a part of a[] . . . failure to act"). Indeed, the chief complaint in many § 706(1) cases is that the agency's preliminary actions have gone on far too long. *See, e.g., Nader v. FCC*, 520 F.2d 182, 206 (D.C. Cir. 1975) (ordering agency, after 10-year delay, to complete "an interminable proceeding, the principal function of which has been that of a giant regulatory wastebasket") (quotation marks omitted); *In re Bluewater Network*, 234 F.3d 1305, 1308, 1315-

[24] In any event, pre-APA mandamus practice was arcane, internally inconsistent, and rapidly evolving before the APA's broad remedy made further evolution unnecessary. *See* Peter L. Strauss *et al., Gellhorn & Byse's Administrative Law* 1118 (9th ed. 1995). Nothing in the APA or its history suggests that in enacting the straightforward language of § 706(1), Congress wanted to maintain every subtle nicety of All Writs practice. The APA was, instead, "meant to bring uniformity to a field full of variation and diversity." *Dickinson v. Zurko*, 527 U.S. 150, 155 (1999).

[25] *Work* did hold that mandamus cannot be used to review an order constituting *final* agency action, 267 U.S. at 255, but that neither supports BLM's position that *any* action precludes § 706(1) jurisdiction, nor conflicts with the exercise of that jurisdiction here. *See infra* at 33.

16 (D.C. Cir. 2000) (ordering agency to issue unreasonably delayed rules, even though it already "ha[d] episodically engaged in some rulemaking" under relevant provision); *Cobell*, 240 F.3d at 1107 (affirming order for agency to comply with fiduciary mandates, even though agency "ha[d] made significant steps toward the discharge of the federal government's fiduciary obligations"). Similarly, here, where the duty at issue is result-oriented – requiring preservation of the wilderness character of designated places – it makes no sense to suppose that half steps that fail to produce that result would preclude judicial review.

In arguing that any action at all precludes § 706(1) review, BLM and the ORV Groups fail to distinguish between cases in which the agency has taken some tentative action short of final affirmative agency action – such as BLM's meetings with ORV user groups to urge them to exercise restraint – and cases in which the agency has taken affirmative agency action that is itself final and reviewable – such as BLM's LUP amendment, adopted *after* this case commenced, closing parts of the Moquith Mountain WSA to ORVs. In the former case, an agency's failure to act cannot be made unreviewable merely because the agency has taken some non-final actions. That would create the no-man's-land where the agency could violate the law but permanently preclude judicial review simply by taking some action that is not final – a jurisdictional gap foreign to the APA.

In contrast, if an agency addresses a problem through *final* affirmative action, a dissatisfied party must obtain review of that final action under § 706(2), not § 706(1), because a final order addressing an issue negates the threshold requirement of § 706(1) review – a final failure to act, whether in whole or in part. In the present case, however, BLM steadfastly refused to take any such definitive action until after SUWA brought suit. *Supra* at 11-12 & n.13.

2. BLM's Post-Complaint Actions Do Not Moot SUWA's Claims, Nor Would Mootness Support BLM's Sweeping Position on Reviewability.

After SUWA commenced this review proceeding, BLM did at long last take several more definitive actions to address the ORV crisis in the four WSAs at issue – thus providing a graphic illustration of the value of judicial scrutiny of inaction under § 706(1). Although neither BLM nor the ORV Groups note the issue, BLM's post-complaint actions pose the question whether SUWA's § 706(1) claim to enforce FLPMA's non-impairment mandate in these WSAs has become moot, since the agency has attempted to comply with that mandate and has taken actions that are, at least arguably, final and reviewable under § 706(2).

The Tenth Circuit did not decide this question, but did instruct the district court to consider mootness on remand. Pet. App. 31a n.17. This Court should likewise refrain from resolving the mootness issue, especially as the issue has not been argued by BLM.

The mootness question is not straightforward. As the Tenth Circuit correctly observed, *id.*, BLM's voluntary cessation of its inaction would not moot SUWA's claim, unless BLM can "meet the heavy burden of proving that the wrong will not be repeated," which BLM has never yet attempted to do in this case. *Am. Iron & Steel Inst. v. EPA*, 115 F.3d 979, 1007 (D.C. Cir. 1997) (quotation marks omitted); *accord Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000). Where an agency has long been recalcitrant in the face of its duty, a court may retain jurisdiction and enter appropriate declaratory or injunctive relief, notwithstanding sudden agency action once judicial scrutiny is brought to bear. *E.g., Ctr. for Auto Safety*, 793 F.2d at 1353-54. In addition, here it is open to question whether BLM's emergency closure orders for three of the WSAs, issued under the authority of 43 C.F.R. § 8341.2, are in fact actions that SUWA can challenge under § 706(2) as not going far enough – because the prerequisite for closure under that regulation is a determination *by BLM* that there is an emergency situation. Accordingly, SUWA's claim very likely is not moot – but in any event these fact-bound questions should be resolved in the first instance by the lower courts.[26]

Most importantly, even if BLM's post-complaint closure orders did moot SUWA's § 706(1) non-impairment claim as to the four WSAs – because review is now available under § 706(2) – that certainly would not support BLM's sweeping theory that FLPMA's non-impairment mandate can *never* be enforced under § 706(1), nor its fallback position that *some* tentative, non-final actions by the agency can eliminate jurisdiction.

E. Enforcement of the Non-Impairment Duty Does Not Interfere with BLM's "Day-to-Day" Activities.

Finally, BLM suggests that judicial enforcement of mandatory duties must be barred to prevent courts from supervising and disrupting the routine operations of federal agencies. But the APA contains explicit limitations that prevent the feared opening of the floodgates, and courts also possess equitable discretion to minimize disruption.

1. The APA Appropriately Limits Judicial Review.

As noted above, the APA contains three express limits on judicial review of agency action. *Supra* at 18. Congress correctly concluded that these limits suffice to cabin the role of federal courts in § 706(1) inaction cases.

For example, Judge McKay in his partial dissent asserted that exercising jurisdiction under § 706(1) here would mean that "any individual unhappy with the INS' efforts to prevent entry of all illegal aliens" into the United States could sue to compel the INS to "enforce" the immigration laws.

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[26] This Court may decide the issue of the lower courts' jurisdiction under § 706(1) at the time the complaint was filed without resolving the mootness issue at this juncture. *See, e.g., Laidlaw*, 528 U.S. at 170-71.

Pet. App. 44a (McKay, J., dissenting in part). Even under the dubious assumption that the requirement of *final* inaction were met under Judge McKay's hypothetical, such a claim would still not be reviewable, both because whether to bring proceedings to "enforce" immigration laws would appear to be "committed to agency discretion by law," *see Heckler*, 470 U.S. at 832, and because "any individual unhappy with the INS's efforts" would have at most an abstract grievance, not the concrete and particularized injury required for Article III standing.

More fundamentally, a § 706(1) claim must be premised on a law creating a mandatory duty requiring action. *See, e.g., Your Home Visiting Nurse Servs., Inc. v. Shalala*, 525 U.S. 449, 456-57 (1999) (noting that where regulation did not mandate but merely permitted action, relief under § 706 is not available to compel action). The typical statute that merely *authorizes* regulators to act and directs them to pursue certain goals when they act cannot be invoked to force an action by an agency – at least absent truly egregious circumstances. *See Heckler*, 470 U.S. at 833 n.4. Section 706(1) applies when Congress has imposed a mandatory duty that *requires* the agency *to act*.

2. The Intrusions Imagined by BLM Are Illusory.

BLM nonetheless suggests that, as a practical matter, § 706(1) jurisdiction impinges on agency prerogatives. For example, BLM asserts that parties will circumvent agencies and go directly to court, and it faults SUWA for not petitioning for a rulemaking here. BLM's criticism is misplaced. SUWA is not seeking a rule of general applicability, but action preventing impairment of the wilderness suitability of four specific WSAs, and SUWA did present those concerns to the responsible BLM officials. *Supra* at 8; *cf. Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1040 (D.C. Cir. 2002), *modified on reh'g on other grounds*, 293 F.3d 537 (D.C. Cir. 2002). More generally, under § 704 of the APA judicial review may not be denied for failure to exhaust agency procedures *except* where so provided by statute or an appropriate regulation. *Darby*, 509 U.S. at 143-47. The APA's prohibition of judicially created exhaustion requirements applies equally under § 706(1) and § 706(2). No statute or regulation requires exhaustion here.[27]

BLM carefully states that when a party does petition the agency, the agency is required only to "issue a decision on the request *to the extent the agency deems appropriate*." BLM Br. 29 (emphasis added). And BLM further contends that judicial review will *not* be available *unless* the agency chooses to respond. *Id.* Thus, on BLM's view, a party must petition the agency, but if BLM chooses not to respond, then judicial review remains unavailable. At bottom, BLM's professed concerns about bypassing the agency are really just another stratagem to preclude *any* judicial remedy for its failure to prevent impairment as required by FLPMA.[28]

BLM also appears to argue that judicial review must be barred because courts will overstep their bounds and begin micromanaging agency activities. BLM Br. 26-27. But § 706(1) neither requires nor permits courts to substitute their discretion for that assigned to the agency by law. It is undisputed that if BLM took final *affirmative* action that impaired the wilderness suitability of a WSA, a court could review and set that action aside as contrary to law, without in any way trenching on the agency's lawful discretion.

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[27] The Interior Department does have a regulation requiring exhaustion of inaction claims concerning *Indian lands*, 25 C.F.R. § 2.8 ("Appeal from inaction of official"), but none for BLM or the lands it manages.

[28] Even if one recognizes that BLM, like other agencies, has a general duty to act on matters presented to it within a "reasonable time," § 555(b), BLM's argument would transmute SUWA's right to judicial review to enforce FLPMA's non-impairment mandate today – before further irreparable destruction occurs – into a mere claim to compel BLM to rule on a petition for relief at some "reasonable time" in the future, with all the delay and continuing impairment that entails. Congress did not authorize such a barrier to timely review. § 704.

Similarly, when BLM's final inaction causes unlawful impairment, the court can issue a general declaratory or injunctive order to compel the agency to comply with the statutory mandate, again without trenching on the agency's lawful discretion.[29]

To the extent that the agency's interpretation of a statute, its findings of fact, or its other determinations would be entitled to deference when reviewed under § 706(2), the same deference would apply under § 706(1). In this case, for example, the court should review BLM's interpretation of the non-impairment standard in the IMP under the deferential *Chevron* two-step framework. Here, the court must also take into account BLM's concession that there was ongoing impairment caused by ORVs in the four WSAs at issue. Cert. Opp. App. 57; *see also, e.g., Cobell*, 240 F.3d at 1089-90 (admission by agency that fiduciary obligations were not satisfied). Of course, in some § 706(1) cases the agency will not have compiled an administrative record, made findings of fact or other determinations, or exercised the discretion it lawfully possesses. But an agency cannot turn its unlawful failure to act into a shield against judicial review of that very failure merely because the agency's inaction also means there is little or no administrative record.

BLM also ignores the important role played by the judiciary's equitable discretion in preventing undue intrusion into agency affairs. Just this Term, the Court rejected artificial limitations on federal court jurisdiction to enforce consent decrees against sovereign States. *Frew ex rel. Frew v. Hawkins*, 124 S. Ct. 899, 904-06 (2004). The Court observed that protection of the "sovereign interests and accountability of state governments" lay not in contracting federal court jurisdiction, but "in the court's equitable powers." *Id.* at 905. The same is true here. Courts can readily accommodate the

[29] Of course, the court could also enter a more specific *preliminary* injunction where necessary to prevent irreparable harm *pendente lite*.

executive interests and accountability of federal agencies by using the courts' own equitable discretion in shaping relief. *Abbott Labs.*, 387 U.S. at 154-56. For example, a court might enter declaratory but not injunctive relief or tailor injunctive relief to the circumstances presented. In the rare instance in which a court exceeds the proper bounds of its jurisdiction, the error can be corrected through the appellate process or, in an appropriate case, mandamus to the lower court. *E.g., Cobell v. Norton*, 334 F.3d 1128, 1138-40 (D.C. Cir. 2003).[30]

3. Notwithstanding BLM's Rhetoric, the Court's Decision in *Lujan* Supports Review.

The propriety of review here is also highlighted by *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990). BLM repeatedly invokes *Lujan*, both directly and by stating again and again that the issue here is judicial intrusion into "day-to-day," "ongoing," or "programmatic" agency affairs. But that rhetoric is untethered to the actual facts or legal issues in this case. Jurisdiction under § 706(1) no more injects the courts into an agency's day-to-day management than does review under § 706(2). In each case, the court simply determines whether the agency's final action or inaction satisfies congressionally imposed requirements and, if not, enters a remedial order requiring the agency to come into compliance – without usurping the agency's discretion.

BLM's invocation of *Lujan* is thus inapposite. In the part of *Lujan* that discusses "programmatic" challenges, the Court assumed *arguendo* that the plaintiffs had standing to

[30] The Tenth Circuit stated in dicta that under § 706(1), a court may exercise its equitable discretion only at the contempt stage, rather than in fashioning injunctive relief in the first place. Pet. App. 21a-23a & n.14. Other courts have exercised discretion concerning the initial relief to be granted. *E.g., Cobell*, 240 F.3d at 1108; *In re Barr Labs., Inc.*, 930 F.2d 72, 74 (D.C. Cir. 1991). This particular dispute is not presented in this case; the courts are in agreement both about the existence of § 706(1) *jurisdiction* and about their power to exercise equitable discretion at some remedial stage of the proceedings.

challenge BLM's actions affecting one parcel of land, but held that the plaintiffs could not leverage that hypothetical standing to challenge actions affecting *over 1250 additional parcels* nationwide – with no connection to the plaintiffs – simply by asserting that the actions were all part of the same "program." 497 U.S. at 892-93. Here, in contrast, SUWA is challenging BLM's final inaction causing impairment in four specific WSAs used by SUWA's members who are directly harmed by the areas' impairment.

Most importantly, *Lujan* stressed that the actions challenged in that case would not have any real-world effects "until some further agency action *or inaction* more immediately harming the plaintiff occurs." 497 U.S. at 892 (emphasis added). The Court added that judicial review would be available when a final action (which includes inaction) "has an actual or immediately threatened effect." *Id.* at 894; *accord Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 733-34 (1998); *Peterson*, 228 F.3d at 568-69. This case is an example of just what the Court had in mind: focusing on particular WSAs, SUWA alleged and proved ongoing irreparable harm being caused by final agency inaction.

II. Actions Required by Land Use Plans Are Enforceable Under § 706(1).

Section 706(1) also authorizes courts to compel BLM to comply with provisions of LUPs that require BLM to take certain actions. Two specific LUP provisions are at issue here: (1) BLM's commitment in the 1991 San Rafael LUP to designate, by 1992, the particular routes open to ORVs; and (2) BLM's commitment in the 1990 Henry Mountains LUP to monitor ORV use in the Factory Butte area to determine whether it should be restricted. Pet. App. 25a. When this case was filed – years after these two commitments were made – BLM had complied with neither one. *Supra* at 8.

A. Under FLPMA, BLM Has a Mandatory Duty to Carry Out Actions Required by LUPs.

FLPMA mandates that BLM "shall manage the public lands . . . in accordance with . . . land use plans." 43 U.S.C. § 1732(a). BLM's regulations likewise provide that "[a]ll future resource management authorizations and actions . . . shall conform to the approved plan." 43 C.F.R. § 1610.5-3(a).[31] By creating binding requirements, LUPs "guide and control future management actions" for discrete areas of public lands. *Id.* § 1601.0-2. Thus, under the plain terms of FLPMA and its implementing regulations, when an LUP provides that BLM must perform some action, the agency has a mandatory duty to "manage . . . in accordance with" the LUP by performing the action. That is the kind of mandatory duty that can be compelled under § 706(1) when – as here – BLM violates the duty through final inaction.

Of course, not every provision of an LUP requires BLM to act. LUPs may include aspirational goals, as well as requirements that apply only in the event that BLM chooses to initiate or approve some future action. In such instances, FLPMA's stipulation that BLM manage in accordance with the LUP does not impose a mandatory duty enforceable under § 706(1) because the LUP itself does not require action.

But that is not the case with the two LUP provisions at issue here. The San Rafael LUP obligates BLM to designate ORV routes by 1992, so BLM must make such designations in order to manage according to that plan. Similarly, because the Henry Mountains LUP provides that the Factory Butte area "will be monitored and closed if warranted," CA10 App. 164, the only way BLM can "manage the public lands . . . in accordance with" that LUP is to perform the

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[31] *See also id.* § 1601.0-5(b) ("'Conformity or conformance' means that a resource management action shall be specifically provided for in the plan, or if not specifically mentioned, shall be clearly consistent with the terms, conditions, and decisions of the approved plan or plan amendment").

promised monitoring and close the area to ORVs if warranted.[32]

Notwithstanding FLPMA's plain language, BLM asserts that the statute "prevent[s] BLM 'from approving or undertaking affirmative projects inconsistent with its land use plans,'" but does not require BLM to comply with LUP obligations to take action. BLM Br. 45 (quoting Pet. App. 49a (McKay, J., dissenting in part)). But as Judge Ebel observed for the majority below, that assertion conflicts with FLPMA's text, which "simply and straightforwardly declares, '[t]he Secretary shall manage the public lands . . . in accordance with the land use plans developed by him.'" Pet. App. 29a (quoting 43 U.S.C. § 1732(a)).

In addition, BLM's position would create a one-sided right to review that is foreign to both FLPMA and the APA. For example, the San Rafael LUP balances conflicting interests by allowing ORVs in the covered area, but restricting them to specific ways once such ways are designated. Under BLM's theory, ORV users would be able to challenge any designation of routes that closed areas to them, because that can occur only through an "affirmative project," but SUWA could not challenge the failure to carry through on the commitment to designate routes by 1992 and thereby restrict ORV use.[33] Nothing in FLPMA or the APA remotely suggests that Congress intended to provide judicial remedies for people whose activities are curtailed by measures to

[32] BLM quotes provisions from a number of *other* LUPs to suggest that they are subject to funding or other limitations. BLM Br. 42 & n.18. But the LUPs quoted by BLM are not at issue in this Court, and BLM cites no such language in the two planning documents that are at issue.

[33] Similarly, under the Henry Mountains LUP, the Factory Butte area will stay open to ORV use unless and until BLM does something affirmative to close it, CA10 App. 164 – at which point the ORV users could challenge the closure. In contrast, by reneging on its commitment to monitor and close the area if warranted, BLM is not undertaking any such affirmative project, so that BLM's view eliminates review on a one-sided basis.

protect public lands, but not for individuals who are harmed by BLM's failure to take mandatory environmentally protective measures. FLPMA requires BLM to manage these areas in accordance with all LUP provisions, including those that require action to protect against the devastation wreaked by ORVs.

B. LUPs Are Not the Purely Programmatic, Voluntary, and Contingent Documents BLM Claims.

BLM tries to bolster its contention that affirmative obligations in LUPs are non-binding by characterizing LUPs as purely programmatic, voluntary, and contingent. To that end, BLM quotes snippets out of context from *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726 (1998), and asserts that the case stands for the general proposition that "such plans, in and of themselves, 'do not command anyone to do anything or to refrain from doing anything' . . . and 'create no legal rights or obligations.'" BLM Br. 43 (quoting 523 U.S. at 733).

Ohio Forestry did not state that *all* LUP provisions lack direct legal force, as BLM's selective quotations imply. It stated only that the *specific* "provisions of the Plan that the Sierra Club challenge[d]" in that case did. 523 U.S. at 733. The forest plan in *Ohio Forestry* set logging goals, selected areas suited to timber production, and determined probable methods of cutting, but – critically – it "d[id] not itself authorize the cutting of any trees," *id.* at 729, "nor d[id] it abolish anyone's legal authority to object to trees being cut," *id.* at 733; *see also id.* at 734 (stressing that Sierra Club would "have ample opportunity later to bring its legal challenge at a time when harm is more imminent and more certain"). The Court recognized that other kinds of plan provisions – including provisions opening or closing specific areas to ORVs – can and do have such direct and immediate effects. *Id.* at 738-39.

That is certainly true of LUPs adopted under FLPMA.[34]

[34] The plan in *Ohio Forestry* was governed by the National Forest

BLM's regulations require LUPs to designate areas as either "open," "limited," or "closed" to ORVs. 43 C.F.R. § 8342.2(a); *see also* Exec. Order No. 11644 (requiring such designations); Exec. Order No. 11989 (same). Approval of an LUP "constitutes formal designation of . . . [ORV] use areas." 43 C.F.R. § 8342.2(b); *see also id.* §§ 8341.1(b) & 8340.0-7 (prohibiting operation of ORVs contrary to such designations and providing for arrest and imprisonment of violators). Thus, ORV designations in BLM's LUPs – unlike the specific logging provisions in *Ohio Forestry* – have immediate legal effect and real-world impact. Another regulation cited by BLM makes clear that this kind of immediate and mandatory duty is a "final implementation decision," in contrast to those obligations that require "further specific plans, process steps, or decisions" before taking effect. *Id.* § 1601.0-5(k).

Relying on the fact that LUPs are "dynamic tools," BLM also argues that enforcing their requirements would place the agency in an "administrative straight-jacket." BLM Br. 44 (quotation marks omitted). That is incorrect. FLPMA specifically permits BLM to amend or revise LUPs at any point. At the same time, it ensures accountability by eliminating the agency's "discretion" to ignore properly adopted plans without formal amendment or revision. Under FLPMA, BLM must first prepare an LUP through a process that involves the public and state and local governments, and BLM must thereafter adhere to the resulting plan unless and until it is amended or revised through a formal process in which the public again has a right to participate. 43 U.S.C. §§ 1712, 1732(a); 43 C.F.R. §§ 1610.5-4 to -6. If BLM were free simply to ignore LUP requirements, as the agency claims, it could make *de facto* amendments without going through the public process required by FLPMA; without undertaking the environmental analysis required by NEPA,

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Management Act, not FLPMA. *See* 523 U.S. at 728-29.

see infra at 46-50; and without providing a reasoned basis for its action, as required by the APA, *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41-42 (1983).

Compelling BLM to perform acts required by adopted LUPs thus does *not* "intrude into BLM's discretion with regard to land use planning and management," BLM Br. 44, because that discretion must be exercised in the planning process, not by ignoring an adopted plan.

C. BLM's Failures to Act as Required by the LUPs Were Final When This Case Was Filed.

Because BLM has a mandatory duty under FLPMA to take actions required by LUPs, the agency can be compelled to comply with that duty if it fails to act and its inaction is final. That is the case here.

The 1991 San Rafael LUP limited ORV use to "designated" roads and trails to stem the ecological destruction caused by ORVs in that area, and committed the agency to complete the actual designation of such routes by 1992. Yet those designations still had not been completed *seven years* later when SUWA filed this case in 1999. In the interim, ORVs were allowed to range over the San Rafael area uncontained by designated routes, causing long-term harm to the fragile area.

Similarly, the Henry Mountains LUP committed BLM to implement its monitoring program in 1990, but BLM still had not done so when this case was filed. As BLM explained in the plan, the monitoring was "a prerequisite to accomplishing the protection objectives associated with the various ORV designations." CA10 App. 176. Those "protection objectives" were never realized, because BLM never carried out the "prerequisite" monitoring. As a result, intensive ORV use continued through the 1990s in the Factory Butte area, scarring the landscape with a dense web of tracks, while BLM failed to take stock of or respond to the crisis. Ex. 3G, Prelim. Inj. Hr'g (July 11, 2002) (photograph

of area); CA10 App. 72 (same).

Once SUWA sought judicial enforcement of these duties, BLM finally instituted the long-missing Factory Butte monitoring program and later – in 2003, after the Tenth Circuit ruling on review – completed the San Rafael Route Designation Plan. *Supra* at 12. As noted, the lower courts have not yet addressed whether BLM's post-complaint actions moot any of SUWA's claims. As with the WSA impairment claims, the effects of BLM's voluntary cessation should be addressed by the lower courts on remand.

III. BLM's NEPA Duty To Take a "Hard Look" at Whether It Must Prepare an SEIS Is Enforceable Under § 706(1).

It is undisputed that (1) ORV use has increased dramatically on BLM's Utah lands over the past decade; (2) BLM's earlier NEPA analyses covering the § 202 areas at issue here did not anticipate the current level of ORV use and the resulting environmental impacts; and (3) BLM has never taken a "hard look" to decide whether it must now prepare SEISs addressing the unanticipated impacts. As all three judges on the Court of Appeals agreed, BLM can be compelled to take that hard look and make that determination in light of the changed circumstances. BLM's contrary view conflicts with *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360 (1989), with the approach followed by every appellate court to consider the issue, and with the APA itself.

In *Marsh*, the Court unanimously held that NEPA and its implementing regulations impose a mandatory and continuing duty on federal agencies to determine whether new information concerning the environmental impacts of *already approved and ongoing* projects requires a supplemental NEPA analysis. 490 U.S. at 374 ("NEPA . . . require[s] that agencies take a 'hard look' at the environmental effects of their planned action, even after a proposal has received initial approval"); *id.* at 385 ("It is . . . clear that, regardless of its eventual assessment of the significance of this new information, the Corps had a duty to take a hard look at the

proffered evidence"); *see also* 40 C.F.R. § 1502.9(c) (Council on Environmental Quality regulation mandating supplementation); *Marsh*, 490 U.S. at 372 (regulation entitled to substantial deference).

NEPA thus requires an agency to determine whether an SEIS is required when two preconditions exist: (1) "there remains major federal action to occur" and (2) new information arises that could "show that the remaining action will affect the quality of the human environment in a significant manner or to a significant extent not already considered." *Marsh*, 490 U.S. at 374 (quotation marks and brackets omitted). Indeed, BLM admits that it must determine whether new information concerning an already approved project triggers the duty to prepare a supplemental NEPA analysis whenever the project "has not yet been . . . completed" and "there remains 'major Federal actio[n] to occur.'" BLM Br. 37 (quoting *Marsh*).

Such a statutory mandate "requir[ing] an agency to take specific action when certain preconditions have been met" is a paradigmatic example of the "clear duties to act" that are enforceable under § 706(1). *Thomas*, 828 F.2d at 793. NEPA is a statute that achieves its objectives "through a set of 'action-forcing' procedures that require that agencies take a 'hard look' at environmental consequences and that provide for broad dissemination of relevant environmental information." *Robertson*, 490 U.S. at 350. "By so focusing agency attention, NEPA ensures that the agency will not act on incomplete information, only to regret its decision after it is too late to correct." *Marsh*, 490 U.S. at 371. The statutory structure could not work, however, if the hard look requirement were not enforceable in court.

BLM responds here in two ways. First, it makes an argument that was not raised below and was not addressed by the Tenth Circuit – that SUWA's NEPA claims are "divorced from a proposed 'major Federal action.'" BLM Br. 39. If the Court chooses to reach this argument, it should reject it. To

the extent BLM is suggesting that a supplemental NEPA claim must be related to a *new* proposed federal action, that is plainly incorrect because it confuses a more typical initial EIS with an SEIS. In the usual situation, an agency prepares an EIS prior to initiating a major federal action and its NEPA compliance is reviewed in conjunction with any challenge to the final decision to go ahead with the action. In the supplemental context, however, the concern is not with the impacts of a new action but with those of an ongoing action approved in the past. This was the situation in *Marsh*, when the Court considered an agency's decision in 1986 that an SEIS was not required for a dam project that had been approved in 1982 and was already one-third complete. 490 U.S. at 367, 378-79.

The question in the supplemental NEPA context, therefore, is not whether there is some new action being considered, but rather whether there is ongoing major federal action left to occur, such that the agency has "'a meaningful opportunity to *weigh* the benefits of the project [that has already been approved] versus the detrimental effects on the environment.'" *Id.* at 372 (explaining that, "up to that point, 'NEPA cases have generally required agencies to file [EISs] when the remaining governmental action would be environmentally "significant"') (quoting *TVA v. Hill*, 437 U.S. 153, 188 n.34 (1978)); *see also id.* at 374; *Laguna Greenbelt, Inc. v. United States Dep't of Transp.*, 42 F.3d 517 (9th Cir. 1994) (supplemental NEPA challenge to freeway on grounds that post-approval fires in area triggered need for SEIS). And the agency has a duty to take a hard look at whether to prepare an SEIS when significant new information exists.

SUWA's NEPA claims reflect these principles and are fully actionable. SUWA alleged and showed that the original EISs for five BLM LUPs are outdated. Each of those plans was a major federal action that when initially approved made myriad decisions concerning land management, including the decision in each instance to allow unrestricted off-road vehicle travel over hundreds of thousands of acres of federal public land. BLM argues that continuing to manage land under LUPs is not ongoing major federal action, but that is incorrect. As explained above, LUPs govern BLM's *ongoing* land management and on-the-ground activities until the LUP is amended or revised, and thus unquestionably have highly significant environmental impacts. That is why BLM's own regulations require the agency to prepare a full EIS before adopting such a plan. 43 C.F.R. § 1601.0-6. When the relevant circumstances change while a plan is still in force, BLM then has a NEPA duty to consider the impact of that change. Thus, here, where BLM retains the authority to amend its LUPs to restrict ORV use, the agency has the "meaningful opportunity to *weigh* the benefits of the" existing LUP "versus the detrimental effects on the environment," just as *Marsh* requires. 490 U.S. at 372.

BLM's second argument is a return to the theme that only "final agency action" can be compelled under § 706(1). This argument fails at the outset because it erroneously assumes that § 706(1) may not be used to compel mandatory but non-final action. But even if this argument were correct, it would not bar review here because a determination whether to prepare an SEIS constitutes final agency action reviewable under § 706(2).

Marsh recognizes this explicitly. Siding with the government in that case, which freely acknowledged in its briefing that a court may review an agency's decision not to prepare an SEIS, the Court concluded that "review of the narrow question before us whether the Corps' determination that the [existing NEPA analysis] need not be supplemented should be set aside is controlled by the 'arbitrary and capricious' standard of § 706(2)(A)." 490 U.S. at 373-76; *see* Br. for the Pet'rs at 36-37, *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360 (1989) (No. 87-1704). That makes sense because a decision not to prepare an SEIS while a major federal action is ongoing is definitive, no subsequent

event must occur before the underlying action can continue, and no subsequent event would provide an opportunity for review. *See Bennett*, 520 U.S. at 177-78. In such a situation, pragmatic considerations dictate that "a person with standing who is injured by a failure to comply with the NEPA procedure may complain of that failure at the time the failure takes place, for the claim can never get riper." *Ohio Forestry*, 523 U.S. at 737. In keeping with *Marsh*, appellate courts have, without exception, reviewed under § 706(2) an agency decision not to supplement an environmental analysis. *See, e.g., Colorado Envtl. Coalition v. Dombeck*, 185 F.3d 1162 (10th Cir. 1999); *Laguna Greenbelt*, 42 F.3d at 529-530; *Mass. v. Watt*, 716 F.2d 946 (1st Cir. 1983) (Breyer, J.). It follows that even under BLM's erroneous theory of how § 706(1) operates, a failure to take a hard look at new information relevant to an ongoing major federal action is subject to judicial redress.[35]

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

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[35] BLM further complains that the Tenth Circuit did not pay sufficient heed to the agency's alleged fiscal constraints. BLM Br. 39. But in the lone case it cites, *Sierra Club v. Thomas*, 828 F.2d 783 (D.C. Cir. 1987), the court took the agency's lack of resources into account when assessing the merits of the Sierra Club's claims and the potential remedy. The case hardly supports BLM's much more dramatic claim that an agency's fiscal constraints may narrow or even do away with federal court *jurisdiction*.

BLM also claims that the Tenth Circuit should have dismissed SUWA's supplemental NEPA claims because of the agency's "assurances" that it would someday perform new NEPA analyses to accompany new LUPs. BLM Br. 39-40. This argument likewise relates to the merits or remedy, not jurisdiction. Moreover, the impropriety of allowing an agency's mere "assurances" to determine federal court jurisdiction is highlighted by BLM's repeated failures to meet these promises. In fact, by the time BLM submitted its "assurances" regarding future planning and NEPA analyses to the Tenth Circuit in its response brief, the agency had *already* missed every single one of the planning deadlines that it was touting, a fact tactfully alluded to by the Tenth Circuit. Pet. App. 38a.

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v.

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ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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TABLE OF CONTENTS

		Page
I.	Section 706(1) authorizes a court to compel only discrete final agency action that has been "unlawfully withheld" or "unreasonably delayed"	1
	A. SUWA is incorrect that anything an agency does or fails to do is "agency action" under the APA	2
	B. SUWA is incorrect that finality under Section 706(1) requires nothing more than an alleged prolonged failure fully to achieve a statutory objective	4
	1. SUWA's interpretation of finality for purposes of Section 706(1) does not comport with the APA's text and structure	4
	2. SUWA's interpretation of finality for purposes of Section 706(1) is inconsistent with the APA's purposes	7
	3. SUWA's interpretation of the finality requirement is unsupported by historical practice	8
	C. SUWA's interpretation of Section 706(1) would invite undue judicial interference with administrative functions	11
II.	SUWA's claims are not cognizable under Section 706(1)	15

TABLE OF AUTHORITIES

Cases:

Bennett v. *Spear*, 520 U.S. 154 (1997)	4, 16
Brock v. *Pierce County*, 476 U.S. 253 (1986)	9-10
Caswell v. *Califano*, 583 F.2d 9 (1st Cir. 1978)	9
Center for Auto Safety, In re, 793 F.2d 1346 (D.C. Cir. 1986)	9

Cases—Continued: Page

Cobell v. *Norton*, 240 F.3d 1081 (D.C. Cir. 2001) 9
Cobell v. *Norton*, 283 F. Supp. 2d 66 (D.D.C. 2003), appeal pending, No. 03-5314 (D.C. Cir.) 9
Colorado Envtl. Coalition v. *Dombeck*, 185 F.3d 1162 (10th Cir. 1999) 17
Deering Milliken, Inc. v. *Johnston*, 295 F.2d 856 (4th Cir. 1961) 8
Environmental Def. Fund, Inc. v. *Hardin*, 428 F.2d 1093 (D.C. Cir. 1970) 9
FTC v. *Standard Oil Co.*, 449 U.S. 232 (1980) 3
Forest Guardians v. *Babbitt*, 174 F.3d 1178 (10th Cir. 1999) 9
Houseton v. *Nimmo*, 670 F.2d 1375 (9th Cir. 1982) 8
ICC v. *United States ex rel. Humboldt S.S.*, 224 U.S. 474 (1912) 11
INS v. *Ventura*, 537 U.S. 12 (2002) 12
Interstate Natural Gas Ass'n v. *FERC*, 285 F.3d 18 (D.C. Cir. 2002) 9
Laguna Greenbelt, Inc. v. *United States Dep't of Transp.*, 42 F.3d 517 (9th Cir. 1994) 17
Ligon Specialized Hauler, Inc. v. *ICC*, 587 F.2d 304 (6th Cir. 1978) 8-9
Lujan v. *National Wildlife Fed'n*, 497 U.S. 871 (1990) 1, 2, 8, 14, 15
Marsh v. *Oregon Natural Res. Council*, 490 U.S. 360 (1989) 16, 17
Massachusetts v. *Watt*, 716 F.2d 946 (1st Cir. 1983) 17
Moskal v. *United States*, 498 U.S. 103 (1990) 6
Public Citizen Health Research Group v. *Commissioner, FDA*, 740 F.2d 21 (D.C. Cir. 1984) 8
Sierra Club v. *Peterson*, 228 F.3d 559 (5th Cir. 2000), cert. denied, 532 U.S. 1051 (2001) 9
Sierra Club v. *Thomas*, 828 F.2d 783 (D.C. Cir. 1987) 9

Cases—Continued: Page

Telecommunications Research & Action Ctr. v. *FCC*, 750 F.2d 70 (D.C. Cir. 1984) 9
Thompson v. *United States Dep't of Labor*, 813 F.2d 48 (3d Cir. 1987) 8
United States ex rel. Dunlop v. *Black*, 128 U.S. 40 (1888) 17
United States v. *Los Angeles & Salt Lake R.R.*, 273 U.S. 299 (1927) 10
Weinberger v. *Salfi*, 422 U.S. 749 (1975) 15
Whitman v. *American Trucking Ass'ns*, 531 U.S. 457 (2001) 3, 10

Statutes and regulations:

Administrative Procedure Act, 5 U.S.C. 551 *et seq.*:
5 U.S.C. 551(4) 10
5 U.S.C. 551(13) 2, 4
5 U.S.C. 553(e) 15
5 U.S.C. 702 ..... 2, 5
5 U.S.C. 704 ..... 2, 4, 5, 6, 17
5 U.S.C. 705 5
5 U.S.C. 706 ..... 5, 6
5 U.S.C. 706(1) ..... *passim*
5 U.S.C. 706(2) ..... *passim*
Federal Land Policy and Management Act of 1976, 43 U.S.C. 1701 *et seq.* 12
43 U.S.C. 1702(b) 13
43 U.S.C. 1732(a) 13, 18
43 U.S.C. 1732(b) 13
43 U.S.C. 1782(c) 2, 13, 15
43 U.S.C. 1783(b) 13
National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.* 16
42 U.S.C. 4332(2)(C) 17
Urgent Deficiencies Act, ch. 32, 38 Stat. 219 (1913) 10
Valuation Act, ch. 92, § 19a, 37 Stat. 701 (1913) 10
14 U.S.C. 691(a) 12

Statutes and regulations—Continued: Page

14 U.S.C. 691(b) 12
15 U.S.C. 4907 13
16 U.S.C. 410r-7(b) 12
16 U.S.C. 410ii-5(a) 12
16 U.S.C. 410ii-5(b) 12
16 U.S.C. 410mm-1(a) 12
16 U.S.C. 410nn-1(a) 12
16 U.S.C. 410rr-7(b) 12
16 U.S.C. 410ss-1(a) 12
16 U.S.C. 410ss-1(d) 12
16 U.S.C. 410xx-1(a) 12
16 U.S.C. 410xx-1(b) 12
16 U.S.C. 410bbb-2(a)(1) 12
16 U.S.C. 410ccc-2(a) 12
16 U.S.C. 430f-10(a) 13
16 U.S.C. 430f-10(b) 13
16 U.S.C. 459e-6(a) 13
16 U.S.C. 459e-6(b) 13
16 U.S.C. 459f-5(a) 13
16 U.S.C. 459g-4(a) 13
16 U.S.C. 459h-4(a) 13
16 U.S.C. 460m-15 13
16 U.S.C. 460x(a) 13
16 U.S.C. 460aa-1(a) 13
16 U.S.C. 460cc-2(a) 13
16 U.S.C. 460gg-4 13
16 U.S.C. 460jj(b) 13
16 U.S.C. 460kk(b) 13
16 U.S.C. 460nn-3(a) 13
16 U.S.C. 460oo(b) 13
16 U.S.C. 460pp(d) 13
16 U.S.C. 460qq(b) 13
16 U.S.C. 460qq(c) 13
16 U.S.C. 460vv-8(a) 13
16 U.S.C. 460vv-8(c) 13
16 U.S.C. 460xx-1(a) 13

Statutes and regulations—Continued: Page

16 U.S.C. 460bbb-3(a) 13
16 U.S.C. 460ddd(a) 13
16 U.S.C. 460ddd(d)(1) 13
16 U.S.C. 460ggg-1(a) 13
16 U.S.C. 460ggg-1(b)(1) 13
16 U.S.C. 460jjj-1(a) 13
16 U.S.C. 460*lll*-11(b)(1) 13
16 U.S.C. 460*lll*-11(b)(2) 13
16 U.S.C. 460mmm-4(a) 13
16 U.S.C. 460nnn-12(b) 13
16 U.S.C. 460ooo-4(a) 13
16 U.S.C. 543c(b)(1) 13
16 U.S.C. 824d(a) 13
16 U.S.C. 1333(a) 13
33 U.S.C. 2316(a) 13
33 U.S.C. 2320(a) 13
33 U.S.C. 2320(b) 13
43 U.S.C. 1783(b) 13
47 U.S.C. 251(d)(1) 2
43 C.F.R.:
Section 1601.0-6 17
Section 1610.5-3(a) 19
Section 1610.5-5 17
Section 1610.5-6 17

Miscellaneous:

66 Fed. Reg. (2001):
p. 55,202 18
p. 56,343 18
68 Fed. Reg. 33,526 18
United States Dep't of Justice, *Attorney General's Manual on the Administrative Procedure Act* (1947) 7
Webster's Third International Dictionary (1993) 3

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FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

As the government's opening brief explains, the Administrative Procedure Act (APA) focuses judicial review on discrete "final agency action"—whether a court is being asked to "compel agency action" under 5 U.S.C. 706(1) or to "set aside agency action" under 5 U.S.C. 706(2). See Gov't Br. 12-30. Accordingly, just as a plaintiff "cannot demand a general judicial review of the BLM's day-to-day operations" under Section 706(2), *Lujan* v. *National Wildlife Fed'n*, 497 U.S. 871, 899 (1990), respondent SUWA cannot demand "a general judicial review" under Section 706(1) of that agency's ongoing management of vast areas of public land in Utah. SUWA does not identify any valid basis in the APA's text, history, or purposes for interpreting Section 706(1) to permit review of an agency's programmatic compliance with general statutory standards, divorced from any specifically identifiable obligation to take final agency action.

I. SECTION 706(1) AUTHORIZES A COURT TO COMPEL ONLY DISCRETE FINAL AGENCY ACTION THAT HAS BEEN "UNLAWFULLY WITHHELD" OR "UNREASONABLY DELAYED"

SUWA contends that Section 706(1) permits a court to review *any* alleged failure by an agency to comply with *any* "mandatory, nondiscretionary duty" (SUWA Br. 18)—re-

gardless of whether the "duty" is to take final agency action within a statutory deadline (*e.g.*, to issue regulations "[w]ithin 6 months," 47 U.S.C. 251(d)(1)), or to administer a program in accordance with general statutory objectives or standards (*e.g.*, "to manage [wilderness study areas (WSAs)] * * * so as not to impair the suitability of such areas for preservation as wilderness," 43 U.S.C. 1782(c)). SUWA's position does not comport with the text, structure, and purposes of the APA, would raise significant separation of powers concerns and produce judicially unmanageable consequences, and is without support even in the cases on which SUWA relies. It should, therefore, be rejected.

The agency conduct to which 43 U.S.C. 1782(c) refers—the ongoing "manage[ment]" of WSAs—is not "agency action" within the meaning of the APA, see *Lujan*, 497 U.S. at 890, and a suit to compel such management (in accordance with the non-impairment provision) thus is not a suit to "compel agency action" within the meaning of Section 706(1). Rather, the non-impairment provision sets a standard against which to measure the lawfulness of particular site-specific agency actions that BLM might undertake in the future in its ongoing management of WSAs.

A. SUWA Is Incorrect That Anything An Agency Does Or Fails To Do Is "Agency Action" Under The APA

The APA authorizes judicial review only of "agency action," see 5 U.S.C. 702, 704, 706(1) and (2), which the APA defines as "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act," 5 U.S.C. 551(13). Standing alone, therefore, the term "agency action" confines judicial review to a particular type of agency activity—namely, a discrete product of an agency's focused decisionmaking process, such as a rule, order, or comparable determination. While SUWA suggests that the term instead encompasses every imaginable type of agency conduct or inactivity (see SUWA Br. 20), Congress would not have used the term so consistently

and defined the term so carefully had Congress simply meant to authorize review of anything an agency might do, or fail to do, in the conduct of its business.

Nor do *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457, 478 (2001), and *FTC* v. *Standard Oil Co.*, 449 U.S. 232, 238 n.7 (1980), support SUWA's view that "agency action" means nothing less than any ongoing course of agency conduct. See SUWA Br. 16-17, 20-21. Both cases involved challenges to a discrete determination that was found to be agency action: the EPA's self-described "[f]inal decision" on implementation of a revised ozone standard in *American Trucking* (which was held to be final agency action) and the FTC's issuance of an administrative complaint in *Standard Oil* (which was held not to be final agency action). Neither case presented a challenge to an agency's ongoing administration of a program, such as the challenge here to BLM's ongoing management of public lands in Utah.

Accordingly, SUWA errs in characterizing Section 706(1) as providing a remedy whenever an "agency's failure to act violates [a] mandatory duty." *E.g.*, SUWA Br. 13. Section 706(1), by its terms, authorizes courts *only* to compel particular "agency action," not to enforce general statutory objectives not tied to such "agency action." Moreover, the statutory references to "agency action * * * withheld" and "agency action * * * delayed" are most naturally read as referring to discrete action that the agency is obligated to take but is holding back, and that is identifiable as such before the agency acts. See *Webster's Third New International Dictionary* 2627 (1993) (defining "withhold" as "to hold back: keep from action," and "to desist or refrain from granting, giving, or allowing"). When an agency is engaging in the ongoing management of an area or a program, and a plaintiff complains only that the agency's management has not yet fulfilled a general statutory objective, the complaint is not, in common parlance, one that the agency has "withheld" some "action" under Section 706(1).

B. SUWA Is Incorrect That Finality Under Section 706(1) Requires Nothing More Than An Alleged Prolonged Failure Fully To Achieve A Statutory Objective

Although SUWA concedes that 5 U.S.C. 704 makes finality a prerequisite to judicial review under Section 706(1) as well as Section 706(2) (*e.g.*, SUWA Br. 19), SUWA maintains that finality means something quite different depending on whether review is being sought under one or the other of those provisions. SUWA does not dispute that, when a plaintiff seeks review under Section 706(2), the finality requirement is satisfied only if the plaintiff is asking the court to "set aside" as "unlawful" some discrete final agency action —a rule, order, or some comparable determination that represents the culmination of the agency's decisionmaking process and carries legal consequences. See *Bennett* v. *Spear*, 520 U.S. 154, 177-178 (1997). Under Section 706(1), however, SUWA maintains that the finality requirement does not mean that the plaintiff must direct its challenge to asking the court to "compel" as "unlawfully withheld or unreasonably delayed" a comparable final agency action. Instead, SUWA asserts that the finality requirement is satisfied whenever there has been "a final failure to act"—by which SUWA means merely any failure to achieve any general statutory objective, at least so long as that failure is "sufficiently definitive and has direct real-world consequences." SUWA Br. 19. SUWA's interpretation of Sections 704 and 706(1) is wrong for several reasons.

1. *SUWA's interpretation of finality for purposes of Section 706(1) does not comport with the APA's text and structure.* Section 704 provides, in relevant part, that "final agency action for which there is no other adequate remedy in a court [is] subject to judicial review." 5 U.S.C. 704. In arguing that Section 704 does not confine a Section 706(1) plaintiff to seeking to compel final agency action that has been unlawfully withheld or unreasonably delayed, SUWA seizes on the APA's definition of "agency action" as including "failure to act." 5 U.S.C. 551(13). SUWA asserts that Section 704 may thus be read to provide that an alleged "final agency [failure to act] * * * [is] subject to judicial review," 5 U.S.C. 704. SUWA Br. 19.

Substituting "failure to act" for "agency action" in Section 704 does not advance SUWA's position. As previously explained (Gov't Br. 14, 33), the scope of the term "failure to act" in Section 551(13) is informed by the antecedent, more specific examples of "agency action" in that provision. A "failure to act" constitutes "agency action," therefore, only if it is a failure to issue "the whole or a part of an agency rule, order," or similarly distinct decision. It does not include an agency's failure to satisfy each and every statutory objective in its administration of a program. What Section 704 makes reviewable, therefore, is the rule, order, or other decision in its final definitive form—whether affirmative final action (reviewable under Section 706(2)) or withheld final action (reviewable under Section 706(1)).

SUWA's interpretation of Section 704 rests, moreover, on the facile assumption that, whenever Congress used the term "agency action" in the APA, Congress intended to encompass not only rules, orders, and other affirmative action, but also "failure to act." Substituting "failure to act" for "agency action" makes sense for some provisions of the APA. Section 702, for example, can only properly be understood as affording a right of judicial review to persons "suffering legal wrong because of agency [failure to act] or adversely affected or aggrieved by agency [failure to act]," 5 U.S.C. 702, because otherwise no one would ever have standing to sue under Section 706(1). But such a substitution would make no sense in Section 706 and various other APA provisions. One would not speak of a court's "compel[ling] agency [failure to act] unlawfully withheld or unreasonably delayed," 5 U.S.C. 706(1), or of a court's "set[ting] aside agency [failure to act]," 5 U.S.C. 706(2). Nor would one speak of a court's "postpon[ing] the effective date of an agency [failure to act]," 5 U.S.C. 705. There is thus no basis to assume (and SUWA's position rests entirely on the as-

sumption) that Congress intended "failure to act" to be substituted for "agency action" in Section 704.

What is particularly crucial here, however, is that the text and structure of Section 706 cannot be reconciled with SUWA's notion of "final failure to act" as encompassing a generalized failure to meet a statutory standard in administering an ongoing program. In an attempt to give content to a "final failure to act" that does not entail a failure to take a specifically identifiable final agency action, SUWA argues that alleged agency inaction is "final" if, for example, it violates "a mandatory duty," "threatens imminent irreparable harm," is the product of "legal error," or extends beyond a "reasonable time." SUWA Br. 24-26 (emphases omitted). But those considerations are already essential components of a court's inquiry on the merits of a Section 706(1) claim into whether the agency's failure to act is "unlawful[]" or "unreasonabl[e]." If those considerations were subsumed into the threshold finality inquiry, as SUWA suggests, the statutory terms "unlawfully withheld or unreasonably delayed" would be deprived of any independent significance. The adoption of SUWA's position would thus contravene "the established principle that a court should give effect, if possible, to every clause and word of a statute." *Moskal* v. *United States*, 498 U.S. 103, 109-110 (1990) (citation and internal quotation marks omitted).

SUWA further errs in asserting that "under § 706(1) the agency action to be *compelled* as a remedy is *different* from the agency action—the failure to act—that is being *reviewed*." SUWA Br. 20. Section 706(1) does not, as SUWA implies, authorize a court to compel just any agency action "as a remedy." Rather, Section 706(1) authorizes a court to compel only agency action that has been "unlawfully withheld or unreasonably delayed." It necessarily follows that the gravamen of any viable Section 706(1) claim is that the agency has "unlawfully" or "unreasonably" failed to take the very "agency action" that the court is being asked to compel. It is that "agency action"—not merely the agency's failure

fully to achieve a statutory objective—that must be "final agency action" for purposes of a Section 706(1) claim.

Nor is SUWA's position consistent with the parallel structure and operation of Section 706(1) and Section 706(2). Properly understood, Section 706(1) authorizes courts to "compel" only the same sorts of "agency action"—*i.e.*, discrete final action, such as a rule or an order—that Section 706(2) authorizes courts to "set aside." SUWA's approach, on the other hand, would authorize courts in Section 706(1) suits to review agency conduct generally, not merely to ascertain whether a particular final action has been "unlawfully withheld or unreasonably delayed," and to order relief not confined to the taking of such final action. That approach would be contrary to the traditional understanding of Section 706(2) as the principal mechanism for judicial review of agency decisionmaking, and of Section 706(1) as a narrow supplemental mechanism to compel completion of discrete agency action so that it may subsequently be reviewed under Section 706(2). See, *e.g.*, United States Dep't of Justice, *Attorney General's Manual on the Administrative Procedure Act* 108 (1947) (discussed at Gov't Br. 22-25).

2. *SUWA's interpretation of finality for purposes of Section 706(1) is inconsistent with the APA's purposes.* SUWA's position would severely undermine the utility of the "final agency action" requirement as a limitation on judicial review under the APA. See Gov't Br. 18-20. It would significantly restrict the circumstances in which Section 706(1) suits could be dismissed at the threshold stage, as well as significantly expand the circumstances in which courts could intervene in the ongoing administration of agency programs.

In a suit under Section 706(2) (or under Section 706(1), as correctly understood), a court may readily ascertain from the pleadings whether the plaintiff has directed its challenge to seeking to set aside (or to compel) final agency action. If the plaintiff has not done so, the suit may be dismissed promptly, without subjecting the government (and other parties) to

unnecessary and burdensome litigation. In contrast, under SUWA's sweeping interpretation of "failure to act" and its "flexible and pragmatic conception of finality" under Section 706(1) (SUWA Br. 14), a court would have to engage in essentially a full merits inquiry in order to determine whether the alleged programmatic failure to act by the agency is final enough to be actionable. The critical limitations on judicial review that Congress included in the APA would be undermined if they could not be enforced at the outset of a case. See *Lujan*, 497 U.S. at 890-894.

Even more significantly, as explained in the government's opening brief (at 18-30) and below (at 11-15), if Section 706(1) were untethered from any anchoring focus on whether the agency has withheld or delayed a specific final action, courts would continually be invited to review, hold trials on, and direct changes in ongoing agency operations. That is not the sort of judicial review contemplated by the APA.

3. *SUWA's interpretation of the finality requirement is unsupported by historical practice.* SUWA errs in asserting that its conception of the APA's finality requirement "is confirmed by *decades* of decisions from the courts of appeals." SUWA Br. 21. Of the several cases that SUWA cites in support of that assertion (see *id.* at 21-22 & n.18), none presented the fatal finality deficiency presented by this case—*i.e.*, the plaintiff's failure to direct its Section 706(1) suit to seeking to compel a particular final agency action it alleges to have been "unlawfully withheld or unreasonably delayed." To the extent that any Section 706(1) claim (or similar claim) was advanced in the cases that SUWA cites, it was a claim to compel an agency to complete a discrete final action—such as the issuance of a regulation, *Public Citizen Health Research Group* v. *Commissioner, FDA*, 740 F.2d 21 (D.C. Cir. 1984); the resolution of an administrative complaint, *Thompson* v. *United States Dep't of Labor*, 813 F.2d 48 (3d Cir. 1987); *Houseton* v. *Nimmo*, 670 F.2d 1375 (9th Cir. 1982); *Deering Milliken, Inc.* v. *Johnston*, 295 F.2d 856 (4th Cir. 1961); the disposition of a permit application, *Ligon Specialized*

Hauler, Inc. v. *ICC*, 587 F.2d 304 (6th Cir. 1978); or similar discrete and definitive action, *e.g.*, *Cobell* v. *Norton*, 240 F.3d 1081, 1102 (D.C. Cir. 2001) (historical accounting of an Indian beneficiary's trust account).[1] To be sure, those cases suggest that, in order to satisfy the APA's finality requirement, an agency's delay in taking such action must be, for example, "extremely lengthy" or "an abdication of statutory responsibility." *E.g.*, *Public Citizen*, 740 F.2d at 32. But none of those cases holds that an agency's ongoing administration of a program—or anything other than a failure to take a specifically identifiable final agency action—may give rise to a suit under Section 706(1). Indeed, in *Sierra Club* v. *Peterson*, 228 F.3d 559, 568 (5th Cir. 2000) (en banc), cert. denied, 532 U.S. 1051 (2001), one of the cases cited by SUWA in this regard (Br. 22 n.18), the court held that an agency's alleged failure to manage national forests in Texas in accordance with the governing statute was *not* cognizable under Section 706(1).[2]

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[1] Although Section 706(1) allows a court to compel the Secretary of the Interior to issue to Indian beneficiaries a statutorily required statement setting forth an accounting of transactions in their individual accounts, the government has appealed subsequent district court orders entering sweeping injunctions under Section 706(1). See *Cobell* v. *Norton*, 283 F. Supp. 2d 66 (D.D.C. 2003), appeal pending, No. 03-5314 (D.C. Cir.).

[2] The appellate decisions that SUWA cites elsewhere in its brief (*e.g.*, SUWA Br. 24-27) similarly involved suits to compel an agency to take discrete final action. See, *e.g.*, *Interstate Natural Gas Ass'n* v. *FERC*, 285 F.3d 18, 57-58 (D.C. Cir. 2002) (suit to compel agency to complete rulemaking); *Forest Guardians* v. *Babbitt*, 174 F.3d 1178, 1180 (10th Cir. 1999) (suit to compel agency "to publish a final regulation" designating critical habitat of endangered species); *Sierra Club* v. *Thomas*, 828 F.2d 783 (D.C. Cir. 1987) (suit to compel agency to complete rulemaking); *In re Center for Auto Safety*, 793 F.2d 1346 (D.C. Cir. 1986) (suit to compel agency to promulgate fuel economy standards); *Caswell* v. *Califano*, 583 F.2d 9 (1st Cir. 1978) (suit to compel Secretary to resolve disability claims more expeditiously); *Telecommunications Research & Action Ctr.* v. *FCC*, 750 F.2d 70, 75 (D.C. Cir. 1984) (suit to compel agency to issue "final order" resolving refund disputes); *Environmental Defense Fund, Inc.* v. *Hardin*, 428 F.2d 1093 (D.C. Cir. 1970) (suit to compel agency to act on petition to suspend or cancel pesticide registration); see also *Brock* v. *Pierce County*, 476

Nor did the pre-APA mandamus practice permit courts to compel agencies or officials to do anything other than to complete a discrete and definitive action. See Gov't Br. 23-25. Nothing in *United States* v. *Los Angeles & Salt Lake Railroad*, 273 U.S. 299 (1927), is to the contrary, as SUWA suggests (SUWA Br. 22). There, a railroad sought review on the meits of "an order of the Interstate Commerce Commission, purporting to determine the 'final value' of [the railroad's] property," as the ICC was required to do under the Valuation Act, ch. 92, § 19(a), 37 Stat. 701 (1913). The Court held that any error in the order was "not a wrong for which Congress provides a remedy under the Urgent Deficiencies Act," ch. 32, 38 Stat. 219 (1913), and that there was no basis for the exercise of general equitable powers, because the order "does not command the carrier to do, or to refrain from doing, anything," "does not grant or withold any authority, privilege or license," and "does not determine any right or obligation." 273 U.S. at 309-310, 313-314. In passing, the Court observed that, because Congress had specifically directed the ICC to issue such orders and "prescribed in detail the subjects on which findings should be made," a carrier would have "the remedy by mandamus to compel the Commission to make a finding on each of the subjects specifically prescribed." *Id.* at 310-311.

An order of the sort at issue in *Los Angeles* might well qualify as final agency action within the meaning of the APA, see 5 U.S.C. 551(4) (defining "rule" to include an agency statement of particular applicability that approves or prescribes "valuations"), although questions might still exist as to the ripeness of a challenge. Cf. *American Trucking*, 531 U.S. at 478-479. More to the point here, however, because the ICC order in *Los Angeles* was a discrete end product of an agency's decisionmaking process that carried legal consequences (*e.g.*, it served as prima facie evidence in

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U.S. 253, 260 n.7 (1986) (noting that Section 706(1) could be invoked to compel disposition of administrative complaint).

future proceedings), the Court's suggestion that the issuance of such an order could be compelled by mandamus is fully consistent with the understanding that Section 706(1) allows a court to compel only final agency action. Accord *ICC* v. *United States ex rel. Humboldt S.S.*, 224 U.S. 474, 477-479 (1912) (holding that mandamus could issue to order agency to exercise jurisdiction in matter that would culminate in discrete action determining rights of common carriers). The Court nowhere suggested in *Los Angeles*, *Humboldt*, or any other decision identified by SUWA that mandamus is available to review an agency's ongoing programmatic compliance with a statutory standard, divorced from any such distinct and definitive action.

C. SUWA's Interpretation Of Section 706(1) Would Invite Undue Judicial Interference With Administrative Functions

As the government has explained, SUWA's sweeping vision of Section 706(1) as a remedy for any perceived failure of an agency to accomplish any "mandatory statutory duty" would open the door to judicial usurpation of agency functions. See Gov't Br. 18-30. Although SUWA asserts otherwise (See SUWA 34-40), SUWA is again incorrect. If Section 706(1) were not confined to the ordering of a discrete final agency action that has been withheld or delayed, courts would be free to engage in wide-ranging review of an agency's ongoing administration of a program, to order systemic changes in an agency's operations that were not specifically required by Congress or requested from the agency, and to reorder an agency's priorities for the allocation of scarce resources.

SUWA's attempt to analogize the scope of judicial review under its reconceptualized Section 706(1) to the scope of judicial review under Section 706(2) is entirely unavailing. See SUWA Br. 37 ("[I]f BLM took final *affirmative* action that impaired the wilderness suitability of a WSA, a court could review and set that action aside as contrary to law, without

in any way trenching on the agency's lawful discretion."). In contrast to a suit under Section 706(2), which can proceed only if it is focused on a final rule, order, or comparable discrete action, a suit under SUWA's vision of Section 706(1) would involve an amorphous challenge to an agency's administration of a program. The court's review of the agency's conduct in such a Section 706(1) suit would not, as in the typical Section 706(2) suit, be guided by the agency's written decision and supporting record and be subject to a deferential standard of review. Instead, as in this case, courts might require development of the underlying facts through discovery and trial. In contrast to the remedy under Section 706(2), which is limited to "set[ting] aside" the final action at issue and remanding to the agency for further proceedings on the discrete issue, see, *e.g.*, *INS* v. *Ventura*, 537 U.S. 12, 14-16 (2002) (per curiam), the remedy under SUWA's vision of Section 706(1) would not be limited to "compel[ling]" specific final action. And, in contrast to a Section 706(2) suit, which ends once the court determines that the agency action at issue is either lawful or unlawful, SUWA's vision of a Section 706(1) suit could stretch on for years as the court monitored the agency's ongoing compliance with its orders.

SUWA is also mistaken in suggesting that courts would not unduly intrude into agency functions because "a § 706(1) claim must be premised on a law creating a mandatory duty requiring action." SUWA Br. 36. The provisions of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. 1701 *et seq.*, that SUWA has sought to enforce in this case are typical of numerous statutory provisions that direct, for example, that "the Secretary shall manage" or "the Secretary shall administer" an area or a program on an ongoing basis to advance generally stated objectives.[3] Especially in

[3] For some of the many uses of such phraseology in the area of public land and resource management alone, see, *e.g.*, 14 U.S.C. 691(a) and (b); 16 U.S.C. 410r-7(b); 16 U.S.C. 410ii-5(a) and (b); 16 U.S.C. 410mm-1(a); 16 U.S.C. 410nn-1(a); 16 U.S.C. 410rr-7(b); 16 U.S.C. 410ss-1(a) and (d); 16 U.S.C. 410xx-1(a) and (b); 16 U.S.C. 410bbb-2(a)(1); 16 U.S.C. 410ccc-2(a);

an era of limited resources, coupled with urgent demands on the Treasury to protect the Nation's security and strengthen its economy, plaintiffs might often claim that an agency's administration of a given area or a given program has not fully achieved all statutory objectives. And, because a Section 706(1) suit to compel the achievement of such objectives would not be directed to a final agency action interpreting the governing statute and applying it to particular circumstances, courts could be expected to assume the authority to decide for themselves what constitutes, for example, programmatic compliance with a statutory instruction to manage a wilderness study area "so as not to impair [its] suitability * * * for preservation as wilderness," 43 U.S.C. 1782(c); or to administer a national trade data bank "to provide the most appropriate data retrieval system or systems possible," 15 U.S.C. 4907; or to ensure "just and reasonable" rates, *e.g.*, 16 U.S.C. 824d(a).

Nor is it any answer to concerns about judicial overreaching for SUWA to suggest that "the court can issue a general declaratory or injunctive order to compel the agency to comply with the statutory mandate." SUWA Br. 38. Even if it were assumed that plaintiffs would initially seek only to have a court issue an order in the same general terms as the statute, such an order would provide the basis for the court subsequently to exercise its contempt power against the agency and its officials, if they did not act in the manner or at the pace that the court and the plaintiffs considered

16 U.S.C. 430f-10(a) and (b); 16 U.S.C. 459e-6(a) and (b); 16 U.S.C. 459f-5(a); 16 U.S.C. 459g-4(a); 16 U.S.C. 459h-4(a); 16 U.S.C. 460m-15; 16 U.S.C. 460x(a); 16 U.S.C. 460aa-1(a); 16 U.S.C. 460cc-2(a); 16 U.S.C. 460gg-4; 16 U.S.C. 460jj(b); 16 U.S.C. 460kk(b); 16 U.S.C. 460nn-3(a); 16 U.S.C. 460oo(b); 16 U.S.C. 460pp(d); 16 U.S.C. 460qq(b) and (c); 16 U.S.C. 460vv-8(a) and (c); 16 U.S.C. 460xx-1(a); 16 U.S.C. 460bbb-3(a); 16 U.S.C. 460ddd(a) and (d)(1); 16 U.S.C. 460ggg-1(a) and (b)(1); 16 U.S.C. 460jjj-1(a); 16 U.S.C. 460*lll*-11(b)(1) and (2); 16 U.S.C. 460mmm-4(a); 16 U.S.C. 460nnn-12(b); 16 U.S.C. 460ooo-4(a); 16 U.S.C. 543c(b)(1); 16 U.S.C. 1333(a); 33 U.S.C. 2316(a); 33 U.S.C. 2320(a) and (b); 43 U.S.C. 1732(a) and (b); 43 U.S.C. 1783(b).

necessary to achieve compliance with the order. Moreover, plaintiffs would be unlikely to restrict themselves to seeking general orders directing an agency to comply with a statutory objective—as is demonstrated by SUWA's motion for a preliminary injunction requiring BLM to close four wilderness study areas and five other areas to all off-road vehicles (ORVs), even though no such closure requirement is contained in FLPMA or any other applicable statute. See SUWA C.A. App. 44-92 (memorandum in support of motion for preliminary injunction).

SUWA argues that confining Section 706(1), consistent with its text, history, and purpose, to suits to compel discrete final agency action would "carve out a 'no-man's-land' of unlawful agency inaction that is permanently shielded from judicial review." SUWA Br. 1. Congress itself, however, made the choice to focus judicial review under both Section 706(1) and Section 706(2) on final agency action (whether action withheld or action taken), unless a statute permits review in other circumstances. As the Court observed in *Lujan* in response to the similar argument that Section 706(2) must be read more expansively because "violation of the law is rampant within th[e] program" at issue, "[u]nder the terms of the APA, [a plaintiff] must direct its attack against some particular 'agency action' that causes it harm," and "cannot seek *wholesale* improvement of [a] program by court decree." 497 U.S. at 891.

That does not mean that judicial review is never available to a person who believes that an agency is not administering a program in accordance with the governing statute. In many instances, as in BLM's management of public lands, an agency does, in fact, take numerous final actions that may be challenged under Section 706(2) for compliance with relevant statutory requirements. Persons may request that the agency take particular final actions they believe would achieve compliance with the statute—and the agency's grant or denial of such a request may itself be final agency action reviewable under Section 706(2). See Gov't Br. 28-29 & n.16.

Such persons would thereby have presented their claims to the agency before presenting them to the court, affording the agency an opportunity to conduct whatever investigations or proceedings it believed appropriate, compile a record, construe and apply relevant statutory and regulatory provisions and agency policies, and render a final disposition of the matter. See 5 U.S.C. 553(e); *Weinberger* v. *Salfi*, 422 U.S. 749, 765-766 (1975). To assert a far broader challenge to an agency's compliance with a general statutory standard in its ongoing administration of a program, however, persons must seek relief "in the offices of the Department or the halls of Congress, where programmatic improvements are normally made," *Lujan*, 497 U.S. at 891, rather than in the courts, so as to preserve the distinction between administrative and judicial functions reflected in the APA and ultimately required by the Constitution.

II. SUWA'S CLAIMS ARE NOT COGNIZABLE UNDER SECTION 706(1)

SUWA's claims in this case do not seek to compel any discrete final agency action that BLM has a mandatory, nondiscretionary duty to take. For that reason, those claims are not cognizable under Section 706(1). See Gov't Br. 30-48.

First, with respect to SUWA's claim to compel BLM's compliance with 43 U.S.C. 1782(c), the provision of FLPMA stating that wilderness study areas are to be managed so as not to "impair the[ir] suitability * * * for preservation as wilderness," SUWA does not, and cannot, identify in that provision any requirement to take specifically identifiable final agency action. Instead, SUWA attempts to preserve that claim solely on the ground that Section 706(1) authorizes review of any agency failure to satisfy a "mandatory, statutory duty," without regard to whether that duty is expressed in terms of taking of final agency action. *E.g.*, SUWA Br. 12-21. As explained above, SUWA's position is untenable. Moreover, SUWA does not dispute that BLM has undertaken an array of activities, some of which consti-

tute final agency action, in order to protect the public lands at issue from ORV damage. This is not, therefore, a case of an agency's abdication of its statutory responsibilities, whether or not they involve the taking of final action.[4]

Second, with respect to SUWA's claim to compel BLM to take a "hard look" at whether to supplement its previously prepared environmental analyses under the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, to address increased ORV use, that claim does not seek to compel final agency action either. See Gov't Br. 36-40. An environmental impact statement (EIS) is neither "the consummation of the agency's decisionmaking process" nor a document "by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett*, 520 U.S. at 177-178 (internal quotation marks omitted). Although SUWA, relying on *Marsh* v. *Oregon Natural Resources Council*, 490 U.S. 360 (1989), argues that a supplemental EIS is itself final agency action under the APA (SUWA Br. 49), SUWA misunderstands *Marsh*. That case did not involve a freestanding challenge under Section 706(2) to an agency's decision whether to supplement an EIS. Instead, the case involved a challenge to the Army Corps of Engineers' "formal decision to proceed with construction of the Elk Creek Dam," 490 U.S. at 367, which was reflected in

[4] During the six days of hearings in the district court, the government presented evidence regarding BLM's management of ORV use on federal lands in Utah, including evidence that: BLM has issued orders prohibiting ORVs entirely in some wilderness study areas and severely restricting ORVs in other areas; BLM has posted signs, erected barricades, and engaged in public education activities designed to confine ORVs to permissible existing trails and open areas; BLM has monitored areas to assess whether additional ORV restrictions should be imposed; and BLM has patrolled areas to the extent that its limited law-enforcement resources permitted to detect unauthorized ORV use. See Gov't C.A. Br. 18-29. Although, as SUWA notes (*e.g.*, SUWA Br. 8), BLM acknowledged that its efforts have not entirely prevented damage to wilderness study areas from ORVs, neither BLM nor SUWA itself has taken the position that such damage has rendered any Utah wilderness study area unsuitable for ultimate inclusion in the wilderness system.

a final agency Record of Decision, see Pet. App. at 53a-58a, *Marsh*, *supra* (No. 87-1704) and was itself the reviewable final agency action. The Corps' decision not to supplement its EIS was thus reviewable *not* because that decision was final agency action, but because it was "[a] preliminary, procedural, or intermediate agency action or ruling" reviewable together with the final agency action taken in the Record of Decision. 5 U.S.C. 704.[5]

Moreover, Section 706(1), like mandamus, authorizes courts to compel only a "precise, definite act" that an agency is without discretion to withhold. See, *e.g.*, Gov't Br. 20-25; *United States ex rel. Dunlop* v. *Black*, 128 U.S. 40, 46 (1888). When, as here, an agency is not proposing any "major Federal action[]," NEPA does not impose any mandatory, non-discretionary duty to prepare or to supplement an EIS. 42 U.S.C. 4332(2)(C). Although BLM's adoption of a land use plan is defined in its regulations as "major Federal action" that requires an EIS (43 C.F.R. 1601.0-6), that "action" is completed once the plan is issued, so that no obligation exists under NEPA to supplement the EIS after approval of the plan. Contrary to SUWA's suggestion (SUWA Br. 48-49), BLM's ongoing management of an area that is covered by a previously promulgated land use plan is not itself "major Federal action," such that BLM would be required continually to reevaluate whether to supplement each of its EISs for existing land use plans in light of changed circumstances. To be sure, BLM is required to engage in additional NEPA analyses in connection with amendments or revisions of its land use plans (43 C.F.R. 1610.5-5, 5-6), and

[5] Similarly, while SUWA cites federal appellate cases that involved claims that NEPA required an agency to supplement an EIS (see SUWA Br. 50), those cases involved a challenge to some *other* agency decision to which the EIS was addressed. See *Colorado Envtl. Coalition* v. *Dombeck*, 185 F.3d 1162 (10th Cir. 1999) (decision to allow expansion of ski area); *Laguna Greenbelt, Inc.* v. *United States Dep't of Transp.*, 42 F.3d 517 (9th Cir. 1994) (decision approving tollroad); *Massachusetts* v. *Watt*, 716 F.2d 946 (1st Cir. 1983) (decision to auction oil drilling rights).

ordinarily in connection with its site-specific actions in an area covered by a plan.[6] BLM may also revisit its NEPA analyses in other situations as it sees appropriate, although BLM is under no mandatory, non-discretionary duty to do so. But those situations are quite different from SUWA's notion that BLM has a continuing freestanding obligation, enforceable in a suit under Section 706(1), to supplement EISs for plans that have already been adopted. That open-ended duty would be unmanageable and would transfer responsibility for allocation of scarce resources from BLM to the courts.[7]

Finally, SUWA's claim to compel BLM to complete certain activities identified in its land use plans also is not cognizable under Section 706(1). See Gov't Br. 40-48. Simply by identifying in a land use plan various activities that the agency anticipates it will undertake in its future planning and management of an area, the agency does not impose on itself a mandatory, non-discretionary duty to complete those activities or to do so within the time projected in the plan (or within what a court determines to be a reasonable time). Nor is any such judicially enforceable duty imposed on the

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[6] BLM has issued notices of intent to prepare or revise land use plans for four of the five areas in which SUWA sought to compel a "hard look" at whether to supplement an earlier NEPA analysis. See 68 Fed. Reg. 33,526 (2003); 66 Fed. Reg. 56,343 (2001); 66 Fed. Reg. 55,202 (2001); see also Pet. App. 32a n.18 (identifying areas). This Office has been informed that BLM anticipates issuing a notice of intent to revise the land use plan for the fifth area in April 2004.

[7] The government's argument that Section 706(1) provides no authority to compel BLM to take a "hard look" at whether to supplement its NEPA analyses is simply a specific application of the government's argument that Section 706(1) provides authority only to compel an agency to take a discrete final action that it is under a mandatory, non-discretionary duty to take. Because the government raised its overarching argument below about the scope of Section 706(1), and the court of appeals addressed it, there is no reason for this Court not to consider the application of that argument to the NEPA claim. Cf. SUWA Br. 47. Nor did SUWA suggest any waiver of that argument in its brief in opposition.

agency by FLPMA or any other applicable statute or regulation.

SUWA errs in attributing that effect to 43 U.S.C. 1732(a), which provides that "[t]he Secretary shall manage the public lands * * * in accordance with the land use plans." SUWA Br. 41. As Judge McKay correctly concluded in his partial dissent below, that provision simply requires that any future site-specific actions that BLM takes in the area covered by a land use plan must be consistent with any binding standards set forth in the plan. Pet. App. 49a. That interpretation of Section 1732(a) is confirmed by 43 C.F.R. 1610.5-3(a), the regulation on which SUWA principally relies (SUWA Br. 41), which provides that "[a]ll future resource management authorizations and actions * * * shall conform to the approved plan." The requirements of the statute and regulation therefore are judicially enforceable only when, unlike in this case, BLM is alleged to have taken an affirmative site-specific action that is inconsistent with the land use plan. Neither provides a basis for a court to order that BLM's limited resources be directed, for example, to patrolling for unlawful ORVs in one area rather than to brush-clearing in another area to reduce a wildfire threat or river-diversion activities in a third area to reduce the threat of flood damage to an archaeological site.

SUWA does not offer any basis to conclude that Congress intended Section 1732(a) to create a judicially enforceable duty to complete activities identified in a land use plan. To the contrary, Congress would have understood, as many of BLM's land use plans expressly note (see Gov't Br. 42-43 & n.18), that an agency's completion of such activities is necessarily subject to available funding, shifting priorities, and other factors that cannot be fully accounted for when the plan is adopted.

In any event, the provisions of the two plans on which SUWA relies do not create mandatory, non-discretionary duties enforceable in a suit under Section 706(1). See SUWA

Br. 7-8, 41.[8] The "monitor[ing]" of ORVs referred to in the ORV Implementation Plan for the Henry Mountain Area does not constitute "agency action," much less "final agency action," that can be judicially compelled, because it does not constitute a discrete action that consummates BLM's decisionmaking process or carries legal consequences. Similarly, although SUWA asserts that the land use plan for the San Rafael area "committed BLM" to designate ORV routes by 1992 (SUWA Br. 7, citing J.A. 152-159, 162-163), the applicable table specifically identified the schedules set out for that and other tasks as merely "anticipated." J.A. 158.

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For the foregoing reasons and those stated in the government's opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

MARCH 2004

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[8] The parties appear to agree that BLM has completed the two activities identified in the land use plans for the San Rafael and Henry Mountain areas that SUWA specifically sought to compel in its preliminary injunction motion. SUWA's claim to compel BLM's compliance with its land use plans may nonetheless retain vitality. Cf. SUWA Br. 40. The claim, as pleaded in SUWA's complaint, is not limited to the two now-completed activities or to the two plans in which those activities were described. The district court dismissed the claim as it pertained to all nine areas that were at issue at the preliminary injunction stage (not merely as it pertained to the two specific activities), and the court of appeals reversed that ruling. See J.A. 56-57; Pet. App. 39a, 75a.